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UPROOTING THE CELL-PLANT: COMPARING UNITED STATES AND CANADIAN CONSTITUTIONAL APPROACHES TO SURREPTITIOUS INTERROGATIONS IN THE DETENTION CONTEXT

Amar Khoday

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AMAR KHODAY*

INTRODUCTION

In their effort to solve crimes, law enforcement agencies employ various interrogation techniques to acquire incriminating evidence. Both Canada and the United States afford an accused certain rights under their respective constitutions that are intended to protect him from the overreaching power of the state during such interrogations. These protections include the right to silence and the right to counsel. [1] When an accused invokes these rights and refuses to provide any statements, some police officers engage in surreptitious forms of questioning that subvert the accused's choice not to speak to the authorities. Enter the cell-plant interrogator.

Cell-plant interrogations involve questioning by an undercover agent who elicits incriminating statements from an accused who is unaware that he is speaking with a state agent.[2] These surreptitious interrogations take place within jailhouses, prisons, or other deten-

* Doctor of Civil Law Candidate and O'Brien Fellow at the McGill Centre for Human Rights and Legal Pluralism, Faculty of Law, McGill University; LLM (McGill University, 2008); JD (New England School of Law, 2004). This Article is revised from my LLM thesis submitted to McGill University in 2008. I wish to acknowledge the suggestions I received with respect to this Article from Professor David Siegel, Laura Otenti, Esq., Alexandra Harrington, Esq., and Romain Rard. I also wish to express my thanks to Professor Ronald Sklar, who supervised the writing of the LLM thesis upon which this Article was based. All errors are mine.

1. *See* U.S. CONST. amends. V, VI ; Charter of Rights and Freedoms §§ 7, 10, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

2. Undercover police officers or jailhouse informants are most often used as state agents in the context of cell-plant interrogations. In some cases, police officers persuade friends or family of the accused to assist in procuring incriminating statements.

tion environments.[3] Such deceptive techniques raise issues of fundamental fairness for two key reasons. First, cell-plant interrogations deprive an accused of the ability to make an informed choice about whether to voluntarily or knowingly provide incriminating statements to the state and thus circumvent his right to remain silent or to have counsel present during an interrogation. Second, detention environments produce numerous anxieties in an accused, which an undercover agent may unfairly exploit to the state's advantage.[4] Undoubtedly, almost all custodial environments contain coercive elements that disadvantage an accused. However, during a standard non-surreptitious custodial interrogation, an accused is advised of his constitutional rights and is afforded the right to have legal counsel present as a buffer between himself and the state. This prophylaxis is absent in cell-plant interrogations.

Confronted with the possibility of admitting incriminating statements procured through such deceptive means, courts in Canada and the United States have placed certain restrictions on their admissibility. These restrictions are rooted in the implied right to silence embedded within s. 7 of the Canadian Charter of Rights and Freedoms and the right to counsel granted by the Sixth Amendment to the United States Constitution.[5] Fundamentally, the Supreme Courts of Canada and the United States have each held that, in the context of cell-plant interrogations, where a state agent has elicited incriminating statements from an accused, the statements may be excluded from evidence.[6] The Supreme Court of Canada has determined that a cell-plant interrogation conducted in a manner that infringes upon an accused's right to silence deprives the accused of the choice to speak to authorities.[7] The Supreme Court of the United States has affirmed that an accused has a right to counsel during "the most critical period of the proceedings," when

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3. Although the term "cell plant" may suggest that cell-plant interrogations only take place in the accused's detention cell, these interrogations may occur anywhere in the detention environment. Nonetheless, the traditional jail cell, given its closed quarters and relative privacy, is the most likely location where these interrogations take place.

4. *See infra* text accompanying notes 18-28.

5. U.S. CONST. amend. VI; Canadian Charter of Rights and Freedoms §§ 7, 10.

6. *See* Kuhlmann v. Wilson, 477 U.S. 436 (1986); United States v. Henry, 447 U.S. 264 (1980); R. v. Broyles, [1991] 3 S.C.R. 595 (Can. 1991), *available at* 1991 Carswell Alta 212 (Westlaw); R. v. Hebert, [1990] 2 S.C.R. 151 (Can. 1990), *available at* 1990 CarswellYukon 7 (Westlaw).

7. *Hebert*, 1990 CarswellYukon 7, ¶ 138.

consultation, thorough investigation, and preparation are vitally important.[8]

While Australian[9] and British courts,[10] in addition to the European Court of Human Rights,[11] have similarly confronted issues related to cell-plant interrogations, courts in Canada and the United States have produced the largest and most extensive volume of jurisprudence on these issues to date.[12] Therefore, for the purposes of achieving greater depth of analysis, this Article will focus on and compare the case law from these two countries. Despite the extremely similar language used by Canadian and American courts in their legal tests, particularly the terms "state agent" and "elicitation," these terms have been interpreted in radically different ways.[13] Furthermore, the scope of s. 7 and the Sixth Amendment protections are remarkably dissimilar in certain respects. Consequently, as this Article shall demonstrate, while factual circumstances in the United States may lead to the exclusion of evidence through the application of the Sixth Amendment Right to Counsel Clause, the same factual circumstances may not lead to the same outcome under Canada's s. 7 right-to-silence protection.

Identifying similarities and distinctions in the criminal procedures of different jurisdictions can highlight the flaws and benefits of the methods that have developed in each country.[14] Such studies permit jurists and scholars to assess the positive and negative aspects of applying various legal approaches to particular issues.[15] Thus, courts in Canada and the United States can learn much from the strengths and weaknesses of the other's approach to cell-plant interrogations and consequently provide greater protections (or

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8. Powell v. Alabama, 287 U.S. 45, 57 (1932) (noting that "the most critical period of the proceeding" for the particular defendants was "the time of their arraignment until the beginning of their trial"). For a discussion of when this critical period begins, *see infra* text accompanying notes 71-73.

9. R. v. Swaffield, (1998) 192 C.L.R. 159 (Austl.), *available at* 1998 WL 1674165.

10. Allan v. The Queen, [2004] EWCA (Crim) 2236, [1]-[143] (Eng.), *available at* 2004 WL 1808797.

11. Allan v. United Kingdom, 36 Eur. H.R. Rep. 12 (Eur. Ct. H.R. 2003), *available at* 2002 WL 31476273.

12. Although Australian courts appear to be producing further jurisprudence on this matter, it is still relatively small in comparison to their North American counterparts. *See, e.g.*, Muehleman v. Florida, 484 U.S. 882 (1987); Kuhlmann v. Wilson, 477 U.S. 436 (1986); Maine v. Moulton, 474 U.S. 159 (1985); United States v. Henry, 447 U.S. 264 (1980).

13. *See* discussion *infra* Parts III, IV.

14. Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 284 (2003-04).

15. *Id.*

lesser protections as the case may be) to criminal defendants under their respective federal constitutional provisions.[16] This Article will set out how legal tests in both jurisdictions should be reformulated accordingly.

Part I will briefly canvass some of the concerns related to the acquisition of incriminating statements in the detention context and explain why these concerns should be given greater weight in the legal tests concerning admissibility of cell-plant statements. Part II will examine and compare the temporal, spatial, and subject matter scopes of protections in s. 7 and the Sixth Amendment by comparing when and where the respective legal protections are operative and by looking at which crimes the rights apply to during an interrogation. Parts III and IV respectively, compare and analyze the jurisdictions' different interpretations of the state agency and elicitation tests by examining the relevant jurisprudence and discussing the strengths and weaknesses of each approach. Ultimately, this Article concludes that the current legal tests in each country should be reformulated to incorporate the most protective aspects of each system. Specifically, the legal tests should be reconstructed to incorporate the definition of state agency rooted in Canadian jurisprudence, while the definition of elicitation should be based on an interpretation found in United States case law.

I. DETENTION ENVIRONMENTS

Jailhouses and prisons have their own unique pressures, subcultures, and social norms.[17] Professor George Dix has noted that an accused's "confinement is likely to bring into play subtle influences that will make [him] particularly susceptible to undercover investigators' ploys."[18] He asserted that "[m]ere confinement might increase a subject's anxiety, and he is likely to seek discourse with others to relieve this anxiety. That search [for a discourse], of course, makes him more susceptible to an undercover investigator

16. Conversely, courts in one jurisdiction may also adopt a more restrictive view of constitutional rights that is prevalent elsewhere and affords police agencies greater leeway in engaging in cell-plant interrogations.

17. *See* RICHARD S. JONES & THOMAS J. SCHMID, DOING TIME: PRISON EXPERIENCE AND IDENTITY AMONG FIRST-TIME INMATES 1-4 (2000) ("Prisoners are thus assimilated into an inmate society which places considerable importance on antisocial attitudes and behavior; within this society, prisoners show solidarity and gain status by adhering to the 'inmate code.'"). However, not all detention environments are the same. For a discussion of jailhouse environments, see *infra* note 20.

18. George E. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 230 (1975).

seeking information about the offense for which the subject has been arrested."[19] Within the context of jailhouse confinement specifically, the four areas likely to decrease a sense of anxiety are, "withstanding entry shock, maintaining outside links, securing stability in a situation of seeming chaos, and finding activities to fill otherwise empty time."[20]

If confinement itself increases an accused's anxiety, violence within detention contexts is very likely to augment this angst significantly.[21] Hans Toch argues that "[c]aricatures of maleness are consensually touted, and (sometimes fraudulently) advertised. Credible or even incredible achievements in physical combat and sexual conquest are rewarded with status, esteem, and collective admiration."[22] He has noted furthermore that "prisons offer a quality of life redolent with restrictions, frustrations, and affronts to self-esteem."[23] In light of the many affronts to dignity and status in the detention context, "[s]tatus calls for demonstrations of bravery or fearlessness, toughness, physical prowess, and loyalty to one's kind."[24] Justice Thurgood Marshall observed that "where the suspect is incarcerated, the constant threat of physical danger peculiar to the prison environment may make him demonstrate his toughness to other inmates by recounting or inventing past violent acts."[25]

Also adding to the state's advantage over an accused in the context of cell-plant interrogations is the fact that law enforcement

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19. *Id.*

20. John M. Klofas, *The Jail and the Community*, *in* INCARCERATING CRIMINALS: PRISONS AND JAILS IN SOCIAL AND ORGANIZATIONAL CONTEXT 244, 246 (Timothy J. Flanagan et al. eds., 1998) [hereinafter INCARCERATING CRIMINALS]. While individuals are incarcerated in both prisons and jails, the former are primarily used to house convicted felons. Jails, conversely, are populated by persons "awaiting trial for serious and nonserious offenses, persons serving time for misdemeanors, persons awaiting transfer to state prison systems, mental health facilities, and other settings." *See* INCARCERATING CRIMINALS, *supra*, at 220. The context of jailhouse confinement is particularly relevant in the case of cell-plant interrogations. Police are often seeking incriminating information about individuals who are being detained pending trial and thus they will be housed in jails more than in any other detention contexts. Most of the cases discussed in this article involved cell-plant interrogation that took place in jail.

21. *See* Hans Toch, *Hypermasculinity and Prison Violence*, *in* MASCULINITIES AND VIOLENCE (Lee H. Bowker ed., 1998); *see also* JAMES MCGRATH MORRIS, JAILHOUSE JOURNALISM: THE FOURTH ESTATE BEHIND BARS 9 (Transaction Publishers 2002) (1998).

22. Toch, *supra* note 21, at 171.

23. *Id.*

24. *Id.* at 172.

25. Illinois v. Perkins, 496 U.S. 292, 307 (1990) (Marshall, J., dissenting).

agents can control the suspect's ability to select people with whom he can confide.[26] Professor Welsh S. White posits that "the police can insure that if the pressures of confinement lead the suspect to confide in anyone, it will be a police agent."[27] Given the state's power to control an accused's "channels of communication, it is blatantly unfair to allow the government to exploit the suspect's vulnerability by trickery of this type."[28] Incarcerated individuals thus have to bear not only the inherent stress that arises from being investigated and interrogated, but also need to manage the anxieties that arise from incarceration itself. These pressures and anxieties should be taken into account when considering the admissibility of statements procured through cell-plant interrogations. With these considerations in mind, the following sections will begin to trace the different dimensions of the constitutional rights at play with an overview of the historical context of these rights.

II. THE SCOPE OF SECTION SEVEN AND THE SIXTH AMENDMENT

A. *Historical and Constitutional Context*

Canada and the United States have similar systems of governance with powers constitutionally distributed among the executive, legislative, and judicial branches of government.[29] In the United States, powers are apportioned between the federal government and its constituent states,[30] while in Canada the division of powers between the federal government and the provinces and territories is also constitutionally established.[31] The Canadian and United States constitutions not only outline the separation of powers, but also contain fundamental protections that limit the actions of government officials against individuals.[32] These constitutional rights are particularly important in the criminal context and include the acqui-

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26. *See* Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 605 (1979) [hereinafter White, *Police Trickery*].

27. *Id.*

28. *Id.*

29. *See* U.S. CONST. arts. I-III; Constitution Act, 1867, 30 & 31 Vict., ch. 3 (U.K.), *as reprinted in* R.S.C., No.5 (Appendix 1985).

30. U.S. CONST. amend X. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

31. Constitution Act, 1867, 30 & 31 Vict., ch. 3 (U.K.) §§ 91, 92, *as reprinted in* R.S.C., No.5 (Appendix 1985).

32. *See generally* U.S. CONST.; Constitution Act, 1867, 30 & 31 Vict., ch. 3 (U.K.), *as reprinted in* R.S.C., No.5 (Appendix 1985).

sition of inculpatory statements from an accused by law enforcement officers.

The United States Bill of Rights was enacted in 1791 and contains an array of individual rights limiting the power of the federal government.[33] The Bill of Rights did not, however, affect the conduct of authorities in individual states or the ways in which such government actors procured incriminating statements until the twentieth century.[34] During the nineteenth century, United States courts started to apply the common law confession rule, which originated under British jurisprudence, to determine whether incriminating statements made by an accused to persons in authority should be excluded if the statements were made involuntarily.[35] Courts examined the reliability of the statements and whether they were procured free from threats or inducements, but did not focus on whether the methods used were unfair.[36]

During the late nineteenth century, the United States common law confession rule acquired a constitutional dimension.[37] This was later merged with the Due Process Clause of the Fourteenth Amendment in 1936.[38] The United States Supreme Court's application of the Fourteenth Amendment's Due Process Clause gradu-

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33. U.S. CONST. amends. I-X.

34. *See infra* text accompanying notes 42-44.

35. British authorities first developed the common law confession rule in the eighteenth century. *See* The King v. Warickshall, 168 Eng. Rep. 234, 234-35 (K.B. 1783). American authorities began applying the rule in the nineteenth century. *See* Commonwealth v. Chabbock, 1 Mass. (1 Will.) 144 (1804), *overruled in part by* Commonwealth v. Carr, 373 Mass. 617 (1977). The United States Supreme Court decided its first case applying the common law confessions rule in *Hopt v. Utah*, 110 U.S. 574 (1884), *abrogated on other grounds by* Diaz v. United States, 223 U.S. 442 (1912). For an overview of the development of the common law confession rule in the United States, see Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 488-90.

36. This began to change during the mid-twentieth century. *See* discussion *infra* note 40.

37. *See* Bram v. United States, 168 U.S. 532, 542 (1897), *abrogated by* Arizona v. Fulminante, 499 U.S. 279 (1991). In *Bram*, the Court stated:

> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."

Id. (quoting U.S. CONST. amend. V).

38. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936) (use of confession as basis of conviction violated defendant's Fourteenth Amendment rights). The Fourteenth Amendment reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

ally shifted from focusing on whether evidence was reliably obtained to examining whether the methods used to obtain the evidence were fundamentally fair.[39] Still, in order for the courts to determine that due process was violated, the police methods employed needed to be sufficiently egregious to warrant their exclusion.[40] Confessions obtained through police methods that fell short of being considered highly offensive would still be admitted, and, thus, the Court's due process jurisprudence failed to substantially curb overreaching state conduct.[41]

During the mid-twentieth century, the United States Supreme Court began to apply certain portions of the Bill of Rights to the actions of state authorities by virtue of the Fourteenth Amendment.[42] This selective incorporation process applied the Fifth

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person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

39. *See* Rochin v. California, 342 U.S. 165, 169 (1952), *overruled in part by* Mapp v. Ohio, 367 U.S. 643 (1961).

40. *See id.* In *Rochin*, police ordered a doctor to extract two capsules from the defendant's stomach. *Id.* at 166. Doctors forcibly inserted a tube into Rochin's stomach and released a substance that induced Rochin to throw up two morphine capsules. *Id.* The Court likened this method to obtaining a confession from a defendant by the use of physical abuse, and held that even where inculpatory statements were independently established as true, "coerced confessions offend[ed] the community's sense of fair play and decency." *Id.* at 167, 173.

41. *See, e.g.*, Crooker v. California, 357 U.S. 433 (1958), *abrogated by* Miranda v. Arizona, 384 U.S. 436 (1966). In *Crooker*, the majority held that due process was not violated and admitted a confession into evidence even though police continued to interrogate Crooker despite his request to see his lawyer. *Id.* at 434. *But see* Spano v. New York, 360 U.S. 315 (1959). In *Spano*, the Court determined that Spano's due process rights were violated when, after being formally charged for murder, the prosecutor and several police officers, one of whom was an old childhood friend, interrogated Spano for roughly eight hours despite Spano's persistent requests to speak with his lawyer. The Court held that Spano's "will was overborne by official pressure, fatigue and sympathy falsely aroused, after considering all the facts in their post-indictment setting." *Id.* at 323.

For further commentary on the application of the due process test to confessions, see Welsh S. White, *Interrogation Without Questions:* Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1209-11 (1980) [hereinafter White, *Interrogation Without Questions*]; White, *Police Trickery*, *supra* note 26, at 593-96. Professor Yale Kamisar has also noted that the safeguards provided by the Court's totality of the circumstances test were largely illusory. Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1996), *reprinted in* POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 41, 43 (1980).

42. The applicable portion of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. During the middle of the twentieth century, the Court, through its doctrine of selective incorporation, made certain provisions of the Bill of

Amendment's Self-Incrimination Clause and the Sixth Amendment's Right-to-Counsel provision to confessions obtained by improper state action.[43] When courts determine that police have used methods to obtain evidence in violation of the accused's constitutional rights, the evidence may be excluded.[44]

Canada's juridical experience with constitutional protections has been considerably shorter than that of the United States. Canada became a largely self-governing state with the passage of the British North America Act in 1867. This Act, however, did not include a body of codified individual legal rights akin to those found in the United States Bill of Rights.[45] Since 1867, the common law confession rule[46] and other statutory protections, such as those included in the Canadian Bill of Rights,[47] have provided Canadian defendants with the sort of protections guaranteed by the United States Bill of Rights.[48] These legal norms, however, failed to sufficiently protect the rights of individual citizens against overreaching

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Rights applicable to the states through the Fourteenth Amendment. Through this doctrine, the Supreme Court and other courts began to apply the important protections found in the Bill of Rights to both federal and state criminal cases. *See, e.g.*, Gideon v. Wainright, 372 U.S. 335, 342 (1963).

43. *See* Malloy v. Hogan, 378 U.S. 1, 7-8 (1964) (self-incrimination); *Gideon*, 372 U.S. at 340-45 (right to counsel).

44. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 398-401, 406 n.12 (1977) (stating that defendant's self-incriminating statements, acquired in the absence of counsel, could not constitutionally be admitted into evidence). Appellate courts have applied various doctrines such as the "harmless error doctrine" to allow evidence otherwise acquired through unconstitutional means. *See, e.g.*, State v. LePage, 630 P.2d 674 (Idaho 1981). In *LePage*, the Idaho Supreme Court held that the accused's Sixth Amendment rights were violated when a state agent deliberately elicited incriminating statements from him. *Id.* at 683-84. The court held, however, that the admission of the evidence was harmless error as the jury would have arrived at the same verdict had the evidence been excluded. *See id.*

45. *See* Constitution Act, 1867, 30 & 31, Vict., ch. 3 (U.K.), *as reprinted in* R.S.C., No. 5 (Appendix 1985); *see also* Bruce E. Shemrock, *Infancy and Maturity: A Comparison of the Canadian Charter of Rights and Freedoms and the United States Constitution*, 3 ILSA J. INT'L & COMP. L. 915, 916 (1997) (noting that individual rights were not addressed in the British North America Act).

46. *See* Ibrahim v. The King, [1914] A.C. 599 (P.C. 1914) (appeal taken from H.K.), *available at* 1914 WL 18406. In *Ibrahim*, the Privy Council stated that "no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." *Id.* at 609; *see also* R. v. Rothman, [1981] 1 S.C.R. 640 (Can. 1981), *available at* 1981 CarswellOnt 43 (Westlaw).

47. Canadian Bill of Rights, 1960 S.C., ch. 44 (Can.).

48. *See* Shemrock, *supra* note 45, at 916.

state conduct.[49] This changed with the passage of the Charter of Rights and Freedoms (Charter), a body of constitutionally enshrined legal rights enacted in 1982.[50] The Charter applies to the actions of federal, provincial, territorial, and local government actors.[51] Evidence obtained through unconstitutional means is not immediately excluded; a party seeking to exclude the evidence must further satisfy the requirements of s. 24(2) of the Charter.[52] Absent some coercive conduct by the state that would render a defendant's incriminating statements involuntary, the Canadian common law confession rule permitted evidence to be admitted where an undercover state agent elicited incriminating statements from an accused during cell-plant interrogations.[53] Following the Charter's adoption, the Supreme Court of Canada placed limitations on whether

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49. The Canadian Bill of Rights was an act of Parliament that granted individuals many of the same rights that would appear in the Charter twenty-two years later. ROBERT J. SHARPE ET AL., THE CHARTER OF RIGHTS AND FREEDOMS 16-17 (2d ed. 2002). However, the Canadian Bill of Rights was deemed to have two key shortcomings that limited its impact. *Id.* at 17. First, it only applied to federal laws and federal actors and not to the laws or actions of provincial or local governments. *Id.* Second, many judges were reluctant to find other challenged parliamentary statutes to be violative of the Canadian Bill of Rights because they were not part of Canada's constitutional law. *Id.*; *see also* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 699-701 (2004) (discussing the application of the Canadian Bill of Rights to federal laws and inconsistent federal statutes).

50. *See* SHARPE ET AL., *supra* note 49, at 1-2, 45-46.

51. Charter of Rights and Freedoms § 32, Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982, ch. 11 (U.K.); *see also* HOGG, *supra* note 49, at 758.

52. *See* Canadian Charter of Rights and Freedoms, § 24(2) ("Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."). In *R. v. Collins*, the Supreme Court of Canada enunciated three factors to assist courts in determining whether evidence should be excluded under s. 24(2). R. v. Collins (1987) 1 S.C.R. 265, ¶¶ 46-50 (Can. 1987), *available at* 1987 Carswell BC 94 (Westlaw). The first factor looks at whether the defendant's constitutional rights or freedoms were infringed upon or denied. *Id.* ¶¶ 26, 32-34. The second factor relates to the impact of the admission of the illegally obtained evidence on the fairness of the trial. *Id.* ¶ 47. The third factor is concerned with the impact that excluding the evidence would have on the repute of the administration of justice. *Id.* ¶¶ 50-51; *see also* R. v. Broyles, [1991] 3 S.C.R. 595, ¶¶ 49-56 (Can. 1991), *available at* 1991 CarswellAlta 212 (Westlaw); R. v. Hebert, [1990] 2 S.C.R. 151, ¶¶ 144-46 (Can. 1990), *available at* 1990 CarswellYukon 7 (Westlaw). *See generally* DAVID PACIOCCO & LEE STUESSER, THE LAW OF EVIDENCE 273-312 (3d ed. 2002).

53. R. v. Rothman, [1981] 1 S.C.R. 640, ¶¶ 51-53 (Can. 1981), *available at* 1981 CarswellOnt 43 (Westlaw).

the State could use such methods to elicit incriminating statements under s. 7's right to silence.[54]

Canadian courts apply a "purposive" approach to interpreting Charter provisions, including the right to silence.[55] A purposive analysis of specific Charter provisions looks to the broader objectives that underlie the provisions in question.[56] In *Hebert*, the Court looked to the underlying values that the right to silence was designed to protect and identified several key principles upon which it based its decision.[57] The Court stated that the broad purpose of the rights enshrined in ss. 7 through 14 of the Charter was "to preserve the rights of the detained individual, and to maintain the repute and integrity of [the] system of justice."[58] With respect to the right to silence more specifically, the Court identified in general terms the asymmetric power relationship between the state and a suspect whom the state has confined.[59] This fundamental imbalance permits the state to exercise its superior power to intrude on the individual's physical freedom by detaining her, thus leaving the

54. *Hebert*, [1990] 2 S.C.R. 151. *Hebert* effectively overruled the *Rothman* decision on its facts. *Id.* ¶ 116; *see also* Michael Brown, *The American Approach to Cell Statements Makes Good Sense, in* Hebert: *A Constitutional Right to Silence—Two Comments*, 77 C.R.3d 194, 195 (1990) (stating that "[i]n overruling . . . *Rothman* the Supreme Court of Canada has elevated the common law right to silence to a constitutional right under section 7 of the Charter"); David M. Tanovich, *The Charter Right to Silence and the Unchartered Waters of a New Voluntary Confession Rule*, 9 C.R.4th 24, 25 (1992) ("*Hebert* has effectively overturned *Rothman*.").

55. Hunter v. Southam, Inc., [1984] 2 S.C.R. 145, ¶¶ 18-20 (Can. 1984), *available at* 1984 CarswellAlta 412 (Westlaw). In *Hunter*, the Court enunciated a fundamental "purposive" approach to interpreting constitutional provisions including the legal rights of suspects subject to criminal investigations. *Id.* The *Hunter* Court stated that the constitution must "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers." *Id.* ¶ 16. In *Hunter*, the Court specifically examined the underlying principles upon which the s. 8 "unreasonable search and seizure" provisions were predicated, rather than merely determining the meaning of "reasonable" in the context of the provision. DON STUART, CHARTER JUSTICE IN CANADIAN CRIMINAL LAW 5 (3d ed. 2001). Also, in *R. v. Brydges*, the Court applied the purposive approach when holding that the police had a duty under the right to counsel provision of s. 10(b) to inform an accused that she could consult legal aid after she had expressed doubt as to whether she could afford legal counsel. R. v. Brydges, [1990] 1 S.C.R. 1990, ¶ 13 (Can. 1990), *available at* 1990 CarswellAlta 3 (Westlaw). The Court stated that s. 10 was purposively aimed "'at fostering the principles of adjudicative fairness,' one of which is 'the concern for fair treatment of an accused person.'" *Id.* (quoting R. v. Clarkson, [1986] 1 S.C.R. 383, ¶¶ 23, 24 (Can. 1986), *available at* 1986 CarswellNB 14 (Westlaw)).

56. *Hunter*, [1984] 2 S.C.R. 145, ¶ 18.

57. *Hebert*, [1990] 2 S.C.R. 151, ¶¶ 118-23.

58. *Id.* ¶ 20.

59. *Id.* ¶¶ 120-21.

suspect unable to simply walk away.[60] The Court posited that "[t]his physical intrusion on the individual's mental liberty in turn may enable the state to infringe the individual's mental liberty by techniques made possible by its superior resources and power."[61] This principle notwithstanding, the *Hebert* Court also acknowledged that s. 7 requires an inherent and critical balancing of interests between the state and the individual.[62] The Court advanced that the state has a legitimate interest in performing its law enforcement duties and is permitted to deprive the suspect of her rights, provided it comports with the principles of "fundamental justice."[63]

In Canada and the United States, investigative techniques that were once permissible are now constitutionally restricted by s. 7's right to silence and the Sixth Amendment's right to counsel. The next section of this Article discusses the scope of these protections in the context of cell-plant interrogations.

B. *Textual Language of the Constitutional Provisions*

The discussion surrounding the scope of s. 7 and the Sixth Amendment must begin with a review of the textual language of these constitutional protections. Section 7 states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[64] Textually, the temporal and spatial aspects of s. 7's protections (that is, when and where they are operative) are not confined to criminal matters or trials.[65] Furthermore, fundamental justice is a seemingly broad notion that the Supreme Court of Canada has interpreted to include the concepts of both procedural fairness as well as substantive fairness.[66]

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60. *Id.*

61. *Id.* ¶ 120.

62. *Id.* ¶ 121.

63. *Id.*

64. Charter of Rights and Freedoms, § 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

65. Indeed, s. 7 has also been applied to civil matters. *See, e.g.*, New Brunswick Minister of Health & Cmty. Servs. v. G. (J.), [1999] 3 S.C.R. 46 (Can. 1999), *available at* 1999 CarswellNB 305 (Westlaw); B. (R.) v. Children's Aid Soc'y of Metro. Toronto, [1995] 1 S.C.R. 315 (Can. 1995), *available at* 1995 CarswellOnt 105 (Westlaw).

66. In a notable 1985 case, the Supreme Court of Canada held that fundamental justice incorporated not only the notion of procedural justice, but that of substantive fairness. *See* Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 (Can. 1985), *available at* 1985 CarswellBC 398 (Westlaw). As certain scholars point out, there were assumptions at the time the Charter was promulgated that the concept of fundamental justice was restricted to procedural justice. *See* SHARPE ET AL., *supra* note 49, at 185.

The Sixth Amendment's Right to Counsel Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."[67] Unlike the broad language of s. 7, the entire Sixth Amendment seems specifically to refer to the rights of a defendant in the context of criminal trials, and, notably, not to interrogations, surreptitious or otherwise, which take place outside of trial.[68] From a temporal perspective, the text of the Sixth Amendment seems limited to the period of the court proceedings surrounding the prosecution of the accused, while spatially, it would appear that the protection is effective in court, but not outside of trial.

Juxtaposing s. 7 and the Sixth Amendment, it becomes immediately noticeable that from a strictly textual vantage point, the former provides an accused with potentially more protection than the latter because s. 7 is not textually confined to criminal proceedings and to the rights of the accused during trial.[69] Thus, one might naturally assume that s. 7 would potentially provide a greater degree of protection for an accused subject to cell-plant interrogations. Jurisprudence, however, demonstrates otherwise.

C. *Temporal and Spatial Scope of Protections*

Canadian and United States jurisprudence have provided a greater depth of understanding to the temporal and spatial scopes of the s. 7 right to silence and Sixth Amendment right to counsel. Turning first to the Sixth Amendment, the right to counsel becomes operative upon the initiation of formal criminal proceedings with respect to a particular crime.[70] Formal proceedings may be initiated "by way of formal charge, preliminary hearing, indictment, information, or arraignment,"[71] and does not begin prior to any of

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67. U.S. CONST. amend. VI.

68. *Id.* The full text of the Sixth Amendment reads as follows:

> In all *criminal prosecutions*, the accused shall enjoy the right to *a speedy and public trial, by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses* against him; to *have compulsory process for obtaining witnesses* in his favor, and to *have the assistance of counsel for his defense*.

Id. (emphases added). Read in its entirety, the language makes specific references to the rights afforded to an accused at her criminal trial.

69. *See* SHARPE ET AL., *supra* note 49, at 179-80.

70. *See* Texas v. Cobb, 532 U.S. 162, 177 (2001) (Breyer, J., dissenting).

71. Fellers v. United States, 540 U.S. 519, 523 (2004) (quoting Brewer v. Williams, 430 U.S. 387, 398 (1977)). In *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008), the

these events.[72] Thus, if an undercover police officer were to elicit incriminating statements from an accused prior to the commencement of formal proceedings with respect to the crime for which incriminating statements were elicited, the Sixth Amendment would not apply and the statements would be admissible.[73]

The temporal limitation of the Sixth Amendment's application to post-formal proceeding questioning notwithstanding, its spatial scope is limitless; it is not confined, for example, to questioning that takes place within a judicial proceeding or by police officers during a custodial interrogation in a detention setting.[74] Where an agent of the state elicits incriminating statements from an accused in a

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Court held that a defendant's initial appearance before a magistrate judge activates the Sixth Amendment right to counsel protection. This is so even where the prosecutor is neither present during this appearance nor even aware that it is taking place. *Id.* A Federal Court of Appeals has held that formal proceedings commenced when the defendant was charged with a complaint rather than by indictment. *See* Manning v. Bowersox, 310 F.3d 571, 575 (8th Cir. 2002).

72. *But cf.* Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964). In *Escobedo*, the Court determined that the Sixth Amendment's right to counsel applied even prior to the commencement of formal proceedings when an investigation was no longer a general inquiry into an unsolved crime and had begun to focus on a particular individual. *Id.* This decision preceded *Miranda v. Arizona*, 384 U.S. 436 (1966), and once *Miranda* was decided two years later, *Escobedo* was effectively sidelined as a precedent for providing suspects with protections during a police interrogation. *See* Yale Kamisar, Brewer v. Williams, Massiah, *and* Miranda*: What Is "Interrogation?" When Does it Matter?*, 67 GEO. L.J. 1, 26 (1978) (noting that *Escobedo* was quickly "shoved offstage" by *Miranda*). Furthermore, *Escobedo*'s extension into the pre-formal proceedings period does not seem to have been followed by subsequent Court decisions. *See, e.g.*, *Fellers*, 540 U.S. 519 (providing examples of subsequent cases where the Court explicitly reaffirmed that the Sixth Amendment applied only once formal proceedings had attached); *Brewer*, 430 U.S. 387 (same).

73. *See* Illinois v. Perkins, 496 U.S. 292, 300 (1990). This unfortunate restriction on scope may have unfair results. For example, if an undercover state agent were to take active steps to elicit incriminating statements from an accused by asking a series of questions normally asked in a non-undercover interrogation, such conduct would result in a Sixth Amendment violation if the conduct took place after formal proceedings had commenced. However, were the very same interrogation to take place prior to the commencement of formal proceedings, the statements would be admitted.

74. *See, e.g.*, *Fellers*, 540 U.S. at 524-25. This is distinct from the Fifth Amendment *Miranda* protections embedded within the Self-Incrimination Clause. *See Miranda*, 384 U.S. 436. In *Miranda*, the Court stated that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. In a subsequent decision, the Court further clarified that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (footnote omitted).

location such as a co-defendant's car,[75] a police informant's house,[76] or in the accused's home,[77] such deliberate acts of elicitation will still likely be found in violation of the Sixth Amendment.

The s. 7 right to silence, despite its seemingly broad textual language, has been restricted by the Supreme Court of Canada.[78] Within the context of cell-plant interrogations, the right to silence is effective, both temporally and spatially, only after an accused is placed into detention[79] and remains in effect for the duration of the accused's confinement.[80] The spatial limitation in the s. 7 jurisprudence seems inconsistent in light of the Charter's broad language,

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75. Massiah v. United States, 377 U.S. 201, 203, 206 (1964).

76. *See* Maine v. Moulton, 474 U.S 159, 167 (1985) (noting that "[a]t the trial, the State did not offer into evidence anything from the recorded telephone conversations, but did offer portions of the tapes of the December 26 meeting, principally those involving direct discussion of the thefts for which Moulton was originally indicted"); *see also* Brief of Respondent at *7, Maine v. Moulton, 474 U.S 159 (1985) (No. 84-786), 1985 WL 667858.

77. *Fellers*, 540 U.S. at 521, 524-25.

78. *See* R. v. Hebert, [1990] 2 S.C.R. 151, ¶¶ 129-33 (Can. 1990), *available at* 1990 CarswellYukon 7 (Westlaw). This is not surprising for the courts must then naturally balance the rights of the state against those of an individual whose rights have been deprived under s. 7. *Id.* ¶¶ 121, 128.

79. *Id.* ¶ 131. The right to silence does not then extend to undercover operations prior to detention where a suspect, whether under indictment or otherwise, makes incriminating statements to state agents, even where such statements have been actively elicited. *See id.*; *see also id.* ¶ 31 ("Prior to the time that an adversary relationship exists between the state and the individual, the right to remain silent has not attached and undercover police work may proceed unhindered."). Notably, this is substantially the same limitation that applies to the s. 10 right-to-counsel provision. Charter of Rights and Freedoms, §10(b), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) ("Everyone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right . . . ."). For a discussion on s. 10, *see* STUART, *supra* note 55, at 284-306.

80. Cell-plant interrogations take place while suspects are incarcerated and, therefore, are clearly in detention. However, detention, at least in the context of other Charter rights such as the s. 10(b) right to counsel, can take place outside of incarceration. For instance, in *R. v. Thomsen*, the Court determined that an individual who was required to submit to a roadside breathalyzer test was detained for s. 10 purposes. R. v. Thomsen, [1988] 1 S.C.R. 640, ¶ 17 (Can. 1988), *available at* 1988 CarswellOnt 53 (Westlaw). However, it is unclear whether an individual who is the subject of a surreptitious interrogation by an undercover state agent while not incarcerated, but nevertheless confined in some way, is in detention for s. 7 purposes. As recently as 2007, the Ontario Court of Appeal stated that it was conceivable that an individual might not be in detention, but still may remain subject to state control in circumstances functionally equivalent to detention. *See* R. v. Osmar, 84 O.R.3d 321, ¶ 42 (Ont. A.C. 2007) (Can.), *available at* 2007 CarswellOnt 339 (Westlaw). Yet the court did not provide any examples of what such circumstances might be. *See id.* It is not out of the realm of possibility, for example, to contemplate a scenario where a suspect who is arrested and confined in a police car following arrest is in detention for s. 7 purposes. In such a scenario, the police could feasibly place in the car with the accused an undercover of-

which seeks to limit government deprivations of life, liberty, and security, except in accordance with the principles of fundamental justice.[81]

The spatial limitations imposed by the Supreme Court of Canada on the right to silence, despite the broad language of s. 7, may be reasonable. The importance of the right to silence (and the right to counsel) in the context of the cell-plant interrogations is clear: the accused is subject to the coercive pressures inherent to custody and has no power to choose with whom she will be confined.[82] For example, individuals who have no experience being incarcerated are particularly vulnerable in such situations to cell-plant interrogations. Law enforcement authorities can place informants or undercover officers into a jail cell who will manipulate an accused into making inculpatory statements. By engaging in jailhouse bravado, the accused may be cajoled into responding in kind with her own recitation of illicit deeds or risk losing face. Where an accused is surreptitiously interrogated outside of custody, she is not subjected to the same coercive pressures as someone confined by the state. This is contrasted with the situation of an accused released on bail because this individual is free to choose whom she speaks with about her alleged crimes. Therefore, while the spatial limitation of the right to silence might not seem to comport with the broad language of s. 7, it is arguably a reasonable limitation because custody presents heightened dangers and an increased power imbalance between the state and the accused.

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ficer, who is pretending to be someone who has also been arrested, who then subjects the accused to an interrogation or its functional equivalent.

81. *See supra* note 79. In an article written prior to the *Hebert* decision, Professor Patrick Healy argued that a constitutional right to silence should be embedded within s. 7 as opposed to s. 10(b), for the latter would limit the right to silence to detention and arrest. *See* Patrick Healy, *The Value of Silence*, 74 C.R.3d 176, 180 (1990). Given that the text of s. 7 does not specifically limit its effect to instances of arrest or detention, the *Hebert* Court could have extended the right to silence to periods not encapsulated by detention. *See id.*; *see also* Gordon Wall, *Doubts Cast on* Hebert *Limits on the Pre-Trial Right to Silence*, 36 C.R.4th 134, 142 (1995) ("On the proper facts, the Supreme Court should have no hesitation in abandoning the detention limit and exceeding the right to silence to any person questioned by the police regarding an offence which the person is suspected of having committed."). However, the Court has not yet abandoned its detention limitation. *See* Patrick Healy, *The Right to Remain Silent: Value Added, But How Much?*, *in* Hebert: *A Constitutional Right to Silence—Two Comments*, *supra* note 54, at 200-01.

82. *See supra* Part II.A for a discussion of these issues.

D. *Subject Matter Scope of the Protections*

The Sixth Amendment's right to counsel provision is "offense specific."[83] As the United States Supreme Court reiterated in *Texas v. Cobb*, the right to counsel only excludes incriminating statements procured through unlawful interrogations related to crimes for which formal proceedings have been initiated.[84] Therefore, if an accused is indicted for robbery, and the police conduct a cell-plant interrogation using an informant who elicits incriminating statements about the robbery, those statements will be excluded from evidence. However, if the informant also elicits statements regarding a murder that the accused committed during the same robbery, but for which formal proceedings had not yet been initiated, such statements regarding the murder would not be excluded. This is true regardless of the fact that the murder took place during the robbery and was factually related to the robbery.[85]

In contrast, nothing in the Supreme Court of Canada's cell-plant decisions specifically limits the application of the right to silence to the crimes for which the individuals are arrested or charged. From a policy perspective, the right to silence should not be so limited. Unlike the Sixth Amendment, s. 7 is not limited to criminal prosecutions where the state has brought formal charges against an accused. Furthermore, the pressures inherent to custodial environments are such that a skilled cell-plant interrogator will assuredly extract incriminating information about other crimes to a

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83. *See* Texas v. Cobb, 532 U.S. 162, 164 (2001).

84. *See id.* at 167-68. However, the Court also held "that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test. *Id.* at 173. *Blockburger* held that "'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one, is whether each provision requires proof of a fact which the other does not.'" *Id.* (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). Generally, the protection attaches once formal proceedings have been commenced against a defendant with respect to a particular offense. *See id.* at 167-68. Thus, police may not question a suspect with respect to a particular offense for which formal proceedings have commenced in the absence of counsel. *See id.* However, the protection does not apply where the police interrogate a suspect for a crime for which formal proceedings have not yet been initiated. In such cases, the Fifth Amendment's self-incrimination protection is operative and the suspect must be "Mirandized." *See id.* at 171.

85. *Id.* This is notably different from the *Miranda* protection covering any crime the police may address during a custodial interrogation. As the Supreme Court of the United States has stated, the *Miranda* protection exists "to counteract the inherent pressures of custodial interrogation, which . . . exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges." Arizona v. Roberson, 486 U.S. 675, 685 (1988).

suspect's detriment. If the fundamental principle underlying the right to silence is the accused's right to choose not to speak to authorities about matters that may incriminate him, such a principle is undermined by engaging in such legal hairsplitting. An accused should be entitled to counsel whenever she is under arrest or detained by the state and questioned about any crimes for which she may be prosecuted.

E. *Illustrating the Scope of Protection*

The following hypothetical scenarios illustrate the different approaches under Canadian and United States law with respect to the spatial, temporal, and subject matter elements of the constitutional protections in question.

1. Hypothetical I

Albert is arrested for murder and is brought in for questioning. He invokes both his rights to counsel and silence and refuses to speak with the police.[86] Albert is placed in a jail cell while awaiting his arraignment. No formal proceedings have been initiated against Albert for any crime. The police place Randall, an undercover police officer, in Albert's jail cell for a twenty-four hour period. During that same period, Randall establishes a relationship of trust with Albert by discussing his own alleged crimes and his connections outside of jail. Randall suggests to Albert that his connections may be of assistance to him. Albert, as a result of Randall's overtures, feels comfortable sharing personal information with Randall. Seizing the moment, Randall asks Albert certain questions that elicit

86. It should be noted that under s. 7, the Supreme Court of Canada has expressly held that an accused does not have to invoke his right to silence prior to a cell-plant interrogation in order for it to be operational. *See* R. v. Liew, [1999] 3 S.C.R. 227, ¶¶ 44, 45 (Can. 1999), *available at* 1999 CarswellAlta 821 (Westlaw). Although the United States Supreme Court has not made any similar declaration with respect to the right to counsel in the context of surreptitious interrogations, there is some precedent to suggest it might rule similarly. *See* Fellers v. United States, 540 U.S. 519 (2004). In *Fellers*, the police went to the accused's home to arrest him pursuant to an arrest warrant and following the initiation of formal judicial proceedings. Without invoking his right to counsel, the accused made incriminating statements regarding the crime for which proceedings had been initiated. *Id.* at 520-21. The Court held that since formal proceedings had attached, the statements were procured in violation of Fellers's right to counsel. *Id.* at 525. According to the facts, no invocation of his right to counsel seemed to have been made prior to his utterance of the incriminating statements. By implication, it is reasonable to suggest, therefore, that the absence of an invocation of the right to counsel does not deprive such individuals of their Sixth Amendment rights, whether in the cell-plant context or otherwise.

incriminating responses about the crimes for which Albert has been arrested. The incriminating information is later used by the prosecutor against Albert.

Applying s. 7 to these facts and assuming that the state agency and elicitation prongs are otherwise satisfied,[87] the temporal and spatial triggers of the right to silence would be satisfied. Albert was questioned by a state agent while in detention. Had these facts taken place in the United States, however, Albert's statements would have been admitted into evidence at his trial. Under the Sixth Amendment, the right to counsel would not protect Albert from his cell plant as formal proceedings had not been initiated against him when his statements were elicited.

2. Hypothetical II

Assume the same basic facts as above, except that Randall is sent in to surreptitiously interrogate Albert only after Albert has been arraigned and has pled not guilty. Assume also that Randall elicits incriminating statements with respect to the crime of murder for which formal proceedings have been initiated against Albert. Under Canadian law, Albert would still be able to successfully prove a s. 7 violation, as the interrogation would have taken place while he was in detention. As indicated above, the commencement of formal adversarial judicial proceedings does not impact the application of the Charter's right to silence. Of course, Albert would still have to show that the evidence should be excluded under s. 24(2),[88] and he would likely be successful given that the evidence obtained was conscriptive in nature.[89] Therefore the result in Hypothetical I would likely be the same as in Hypothetical II under these facts with respect to the application of s. 7.

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87. *See infra* Parts III-IV for a discussion of the state agency and elicitation prongs.

88. For a discussion of s. 24(2), see *supra* note 52.

89. As the Supreme Court of Canada has stated:

> [W]here . . . an accused is conscripted to give evidence against himself after clearly electing not to do so by use of an unfair trick practised by the authorities, and where the resultant statement is the only evidence against him, one must surely conclude that reception of the evidence would render the trial unfair.

R. v. Hebert, [1990] 2 S. C. R. 151, ¶ 147 (Can. 1990), *available at* 1990 CarswellYukon 7 (Westlaw). Conscriptive evidence refers to evidence that persons have been compelled to provide against themselves. *See* PACIOCCO & STUESSER, *supra* note 52, at 230-31, 365.

However, with these facts the results under the Sixth Amendment would be radically different than in Hypothetical I. Here, formal proceedings have been initiated for the crime to which the elicited statements referred, and Albert's Sixth Amendment right to counsel has attached. Therefore, Albert's post-arraignment elicited statements would be excluded.[90]

Under these facts, Albert would be able to seek protection under both Canadian and United States constitutional law. Canadian and United States precedents are consonant, assuming the state agency and elicitation prongs of each country's legal tests have been met, when cell-plant interrogation takes place while the accused is in detention and when formal proceedings have been initiated with respect to the crimes about which the police elicit incriminating information.

3. Hypothetical III

Albert is arrested for murder and gives no statement to the police. The police decide not to send in a state agent to surreptitiously interrogate Albert. Albert is arraigned and released on bail. The police employ Brian, the co-defendant in Albert's case who is a long-time friend, to elicit incriminating statements from Albert. Brian, who is represented by different counsel, is equipped with a wire and visits Albert at his home. In their discussions, Brian elicits incriminating statements from Albert regarding the murder.

Under a s. 7 analysis, the conduct of the authorities in this hypothetical would not amount to a Charter violation as the surreptitious questioning took place outside of detention.[91] While Albert would not receive protection under s. 7 based on the facts of this hypothetical scenario, he would be protected under the spatial scope of the Sixth Amendment's right to counsel following the precedent of *Massiah*.[92] However, if Brian elicited incriminating state-

90. These facts are similar to those of *United States v. Henry*, 447 U.S. 264 (1980), in which the defendant admitted his guilt to a fellow prisoner who was a government informant. *Id.* at 266. The Court held that the defendant's Sixth Amendment rights were violated when incriminating statements he made to the informant were used in his prosecution. *Id.* at 272-73.

91. *See, e.g.*, R. v. Unger, 82 Man. R.2d 244 (Man. Q.B. 1992) (Can.), *available at* 1992 CarswellMan 336 (Westlaw).

92. *See* Massiah v. United States, 377 U.S. 201 (1964). These facts are similar to those in *Massiah*, wherein the codefendant, acting as an undisclosed government agent, elicited incriminating statements from the defendant. The Court held that the incriminating statements were inadmissible as they were procured in violation of the defendant's right to counsel. *Id.* at 206.

ments about other crimes for which formal proceedings had not yet been initiated, those statements would not be excluded and may be admitted into evidence at Albert's trial in accordance with *Texas v. Cobb*.[93]

F. *Concluding Thoughts on the Scope of Protection*

The temporal, spatial, and subject matter scopes of the s. 7 right to silence provide a more balanced and practical approach to providing rights to an accused than those of the Sixth Amendment. Section 7 protects an accused against cell-plant interrogations during detention. It is thus operational when an accused is potentially most vulnerable: when she first enters the detention environment and her choice of persons to speak to is limited. At present, the right to silence is not limited to incriminating statements respecting crimes for which an accused has been arrested or for which formal proceedings have commenced. It, therefore, is not an offense-specific protection. Although the Sixth Amendment provides greater spatial coverage than s. 7, it only begins after the commencement of formal proceedings and fails to protect an accused from overreaching activity prior to that period. Furthermore, its protection does not extend to other crimes, even those that are factually related to the crime for which formal proceedings have commenced against the accused.

III. STATE AGENCY

In both Canada and the United States, in order to have statements excluded, an accused must show that they were elicited by an agent of the state. However, each country utilizes different criteria to determine the presence or absence of an agency relationship between the state and a putative agent. The Supreme Court of Canada's test looks to the material impact of the state's intervention on the exchange between the accused and the state agent. In contrast, United States judicial interpretations of state agency focus on whether a contractual relationship between the informant and the state has been created. A comparative analysis of these legal tests, as applied to cell-plant interrogations, establishes that the Canadian model is a preferable and more realistic approach to providing constitutional rights to an accused. The Canadian interpretation of state agency is also a more purposive approach because it provides

93. *See* Texas v. Cobb, 532 U.S. 162 (2001); *supra* note 84 and accompanying text.

greater protection to an accused, and thus significantly limits law enforcement's ability to circumvent an accused's constitutional rights.

A. *The General Factors: Intervention of the State v. Contractual Relationships*

To date, the United States Supreme Court has not formulated a bright-line test to determine the existence of a state agency relationship with respect to the application of the Sixth Amendment right to counsel in cell-plant interrogations.[94] Consequently, various state and federal courts in the United States have developed disparate interpretations of state agency based on their understanding of the factual circumstances of *United States v. Henry*, the Supreme Court's first cell-plant interrogation case.[95] In *Henry*, federal law enforcement officers formed an agreement with Nichols, a jailhouse informant, who elicited incriminating statements from the accused about his participation in an armed bank robbery.[96]

The *Henry* Court focused on certain factors to determine that an agency relationship existed between the state and Nichols.[97] First, Nichols was paid on a contingent-fee basis and thus would only be paid if he produced incriminating information about Henry.[98] Lower courts are split as to whether an agreement must be in writing and expressly stipulate the form of remuneration in advance or whether such agreements can be implied from the circumstances without the form of compensation being offered.[99] Sec-

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94. As the United States Court of Appeals for the Eleventh Circuit has noted, "no 'bright line test for determining whether an individual is a Government agent for purposes of the Sixth Amendment' has emerged." Lightbourne v. Dugger, 829 F.2d 1012, 1020 (11th Cir. 1987) (quoting United States v. Taylor, 800 F.2d 1012, 1015 (10th Cir. 1986)); *see also* Jackson v. State, 643 A.2d 1360, 1374 (Del. 1994). In *Jackson*, the Delaware Supreme Court stated: "'State agent' for Sixth Amendment purposes defies easy definition. The Supreme Court's major Sixth Amendment right to counsel opinions . . . do not define the term, focusing instead on the method of gathering information." *Id.*

95. *See Henry*, 447 U.S. at 270.

96. *Id.* at 267.

97. *Id.* at 270.

98. *Id.*

99. *See* Randolph v. California, 380 F.3d 1133 (9th Cir. 2004) (holding that an explicit agreement is not necessary). *But see* United States v. Malik, 680 F.2d 1162, 1165 (7th Cir. 1982) (holding that an inmate who acquired information from the defendant, even though the inmate had previously been a paid informant for the government, was not a state agent because the inmate's relationship with the government had been broken off before the information was acquired); United States v. Van Scoy, 654 F.2d

ond, although Nichols was informed by the authorities that they were interested in receiving information about various federal detainees in the local jail, Henry was specifically identified as one of these individuals.[100] This has also produced further disparities among United States jurisdictions on the question of whether government authorities have to identify a specific accused to its agent prior to the agent's eliciting incriminating statements in order for a Sixth Amendment violation to be found.

In contrast to its United States counterpart, the Supreme Court of Canada has formulated more specific and comprehensive legal tests to determine the existence of a state agency relationship. In instances where undercover police officers or prison guards elicit incriminating statements from an accused, the Court has expressly held that such individuals are state agents for s. 7 purposes.[101] The more challenging state agency questions arise where the incriminating statements are elicited by a jailhouse informant or even by a friend of an accused. For instance, in *R. v. Broyles*, the accused was arrested and detained for the murder of his grandmother.[102] Failing to obtain inculpatory statements from Broyles, police persuaded Ritter, a friend of the accused, to visit Broyles in jail. Ritter successfully elicited incriminating statements from Broyles about the murder.[103] Unlike typical cell-plant state agents such as undercover police officers and jailhouse informants, Ritter was not provided any remuneration or benefit in exchange for obtaining the information.[104]

While United States jurisprudence has focused on the existence of a contractual relationship, the *Broyles* Court instead emphasized the material impact that the state agency relationship must have on the exchange between the putative state agent and the accused in order for state agency to be found.[105] It stated: "[w]ould the exchange between the accused and the informer have taken

257, 260-61 (3d Cir. 1981) (holding that an inmate who was previously an informant for the government was not a state agent at the time he acquired the incriminating information from the defendant).

100. *Henry*, 447 U.S. at 254 n.8.

101. *See* R. v. Broyles, [1991] 3 S.C.R. 595, ¶ 27 (Can. 1991), *available at* 1991 CarswellAlta 212 (Westlaw).

102. *Id.* ¶ 3.

103. *Id.* ¶ 4.

104. *Id.*

105. *Id.* ¶ 30 ("Only if the relationship between the informer and the state is such that the exchange between the informer and the accused is materially different from what it would have been had there been no such relationship should the informer be considered a state agent for the purposes of the exchange.").

place, in the form and manner in which it did take place, but for the *intervention* of the state or its agents?"[106] But for the state's intervention, the conversations between Broyles and Ritter would not have occurred.

The *Broyles* Court also foresaw that even where there is no pre-existing relationship between the state and a putative agent at the time the elicitation takes place, there may be instances where the state will "make it known" that it will reward an informant for acquiring incriminating information from other inmates.[107] The Court asserted that the test in such circumstances would be whether "the exchange between the informer and the accused [would] have taken place but for the inducements of the authorities."[108] Thus, where the state provides an inducement, such conduct may give rise to a finding of state agency and does not allow the state to so easily circumvent an accused's rights by asserting the absence of a formal agreement or offer of payment in exchange for producing incriminating evidence.

The following subsections discuss in greater detail the disparate approaches to state agency found in United States jurisprudence to demonstrate how the Canadian tests articulated in *Broyles* may help avoid these jurisdictional splits and simultaneously advance a more logical approach to constitutional protection in these contexts.

B. *Offer of Remuneration*

Rooted in the holding of the *Henry* decision, numerous courts have found that the state agency prong will not be satisfied unless there is a contractual agreement setting out the terms of remuneration between the state and the informant.[109] Although in *Henry*, the informant Nichols received money, courts have recognized that

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106. *Id.* (emphasis added).

107. *Id.* ¶ 32.

108. *Id.*

109. *See, e.g.*, United States v. York, 933 F.2d 1343, 1357 (7th Cir. 1991), *overruled on other grounds by* Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999). The Court of Appeals for the Seventh Circuit has stated that "there is no agency absent the government's agreement to reward the informant for his services." *Id.* However, the *York* court also stated that an agreement need not "be explicit or formal, and [can be] inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct over a sustained period of time." *Id.*

other forms of consideration can be offered.[110] Given the deprivations that inmates experience in confinement, there are various types of remuneration that law enforcement officers can offer to a willing informant to induce him to inform on another inmate. These could include material benefits while in detention, preferential treatment, or, for example, a reduced sentence.[111] In *United States v. Sampol*, an informant employed by the state was given probation in exchange for providing information about the accused.[112] As the *Sampol* court noted, freedom is "a commodity more precious than money."[113]

Whatever the form of remuneration, some United States courts require that the consideration be expressly offered at the outset.[114] This effectively requires that an accused prove that law enforcement officers formalized an agreement with an informant prior to the elicitation. Consequently, law enforcement could easily circumvent the creation of an agency relationship by simply mentioning to an informant its interest in receiving information about a given accused without formally offering any compensation to the informant.[115]

Other federal and state courts have found that implied contracts between an informant and law enforcement are sufficient to create an agency relationship,[116] even where the compensation is not expressly offered.[117] Indeed, when the state creates an expectation in the informant that he will receive some remuneration, such action should be sufficient to find an agency relationship.[118] In

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110. *See, e.g.*, United States v. Brink, 39 F.3d 419, 424 (3d Cir. 1994) (noting that the informant apparently acted "on the reasonable assumption that government officials were aware of his actions and would reward him in the future, if not presently, with a recommendation for a reduction in his sentence").

111. *Id.* at 423 n.5.

112. United States v. Sampol, 636 F.2d 621, 634-36 (D.C. Cir. 1980).

113. *Id.* at 638.

114. Lightbourne v. Dugger, 829 F.2d 1012, 1020-21 (11th Cir. 1987); Thomas v. Cox, 708 F.2d 132, 134-36 (4th Cir. 1983); State v. Swinton, 847 A.2d 921, 966 (Conn. 2004); Commonwealth v. Rancourt, 503 N.E.2d 960, 963-64 (Mass. 1987).

115. *See* Maia Goodell, *Government Responsibility for the Acts of Jailhouse Informants Under the Sixth Amendment*, 101 MICH. L. REV. 2525, 2547 (2003) (noting that "[r]efusing to consider more informal agreements ignores the reality of these arrangements, where an implication can carry as much force as an explicit promise").

116. Randolph v. California, 380 F.3d 1133, 1144 (9th Cir. 2004); Commonwealth v. Franciscus, 710 A.2d 1112, 1120 (Pa. 1998); Commonwealth v. Moose, 602 A.2d 1265, 1270-71 (Pa. 1992).

117. *See supra* note 109.

118. As the Pennsylvania Supreme Court stated, "[i]n the absence of a reward, whether it be pecuniary in nature or in the form of an agreement to testify [favorably]

United States v. Brink, the United States Court of Appeals for the Third Circuit noted that the informant, Scott, may have informed on the accused because he reasonably believed that he would receive a reduced sentence.[119] The court observed that the government had trained Scott to be an informant and advised him that his cooperation would be reported to the United States Attorney and the Attorney General.[120] After Scott began his duties as an informant, he was placed in a jail cell with the accused and was later approached by a state trooper who asked if Brink had given any information about his alleged crime.[121] Scott informed the trooper about Brink's incriminating statements, which were admitted at trial.[122] The *Brink* court concluded that, given Scott's "propensity to act" as an informant and his placement in the cell with the accused, it was reasonable to infer a deliberate effort by the state to obtain incriminating information, notwithstanding that Scott was never specifically offered any remuneration at the outset.[123]

Similarly, the United States Court of Appeals for the Ninth Circuit held that an informant's cooperation rendered him a state agent even absent an explicit agreement. In *Randolph v. California*, the informant, Moore, elicited incriminating statements from the accused, Randolph, a developmentally disabled inmate with an IQ of fifty-nine.[124] The prosecutor and police officer who were interested in receiving incriminating information about Randolph explicitly told Moore not to expect anything in exchange for his testimony.[125] The Ninth Circuit determined that although he was not offered any specific remuneration, "[I]t is clear that Moore hoped to receive leniency and that, acting on that hope, he cooperated with the State."[126] The court held that:

> an explicit agreement to compensate Moore is not necessary to a finding that Moore acted as an agent of the State. There is suffi-

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regarding the informant's assistance to the police, there would be no incentive for informants to aid law enforcement agencies." *Franciscus*, 710 A.2d at 1120.

119. United States v. Brink, 39 F.3d 419, 424 (3rd Cir. 1994); *see supra* note 110.

120. *Id.*

121. *Id.*

122. *Id.* at 421.

123. *Id.* at 424.

124. Randolph v. California, 380 F.3d 1133, 1144 (9th Cir. 2004). That Randolph was developmentally disabled would seem to be another compelling reason why the Sixth Amendment should have been applied more vigorously. He was likely more vulnerable to the ploys of skilled jailhouse operatives seeking to elicit incriminating statements.

125. *Id.*

126. *Id.*

> cient undisputed evidence to show that the State made a conscious decision to obtain Moore's cooperation and that Moore consciously decided to provide that cooperation. That cooperation rendered Moore an agent of the State.[127]

Both *Brink* and *Randolph* represent the most realistic and purposive judicial approaches to the creation of agency relationships. *Henry* demonstrated that the state could not circumvent an accused's right to counsel once formal proceedings had commenced by surreptitiously interrogating a defendant who was unaware that an interrogation was occurring.[128] To define state agency narrowly, as some United States courts have done, effectively permits law enforcement officials to circumvent the spirit of the *Henry* protection.

Yet even if most courts were to follow the *Randolph* and *Brink* approaches to this aspect of state agency, they would still not encompass situations in which the state is assisted by friends or family members of an accused who procure inculpatory statements with neither promise nor expectation of compensation for such cooperation. In so doing, the state acts in a surreptitious manner by seeking to obtain information through deceptive means that it could not obtain through regular police interrogation procedures. Furthermore, in deploying a friend or family member, the state exploits a relationship of trust between the accused and an agent from whom an inmate, given her confinement, is likely to seek solace. Therefore, the Canadian approach under *Broyles* offers greater protection to a vulnerable accused than the United States approach, even under *Brink* and *Randolph*.

C. *Government Instructions to Target a Specific Accused*

An agency relationship typically involves the existence of a principal who exercises control over its agents' actions.[129] In the context of cell-plant interrogations, United States courts are divided about the degree to which such control needs to be manifested.[130] This division turns on whether state authorities need to

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127. *Id.*

128. *See* United States v. Henry, 447 U.S. 264 (1980).

129. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

130. *See, e.g.*, United States v. Johnson, 338 F.3d 918 (8th Cir. 2003); United States v. LaBare, 191 F.3d 60 (1st Cir. 1999); United States v. Birbal, 113 F.3d 342 (2d Cir. 1997).

instruct an informant to elicit information from a particular accused or if the informant can act as an agent-at-large.[131] Courts in some jurisdictions hold that a specific targeting requirement is necessary to prove a Sixth Amendment violation.[132] At the same time, other courts have found such distinctions inconsequential.[133]

Contractual relationships between the state and an informant may be established in writing or implied from the circumstances.[134] However, even where such agreements are written, they might not state the name of the individual about whom the informant is expected to obtain information. The recognition of an agency relationship should not depend on whether the name of the accused has been brought to the informant's attention, but instead whether the agent is engaged in obtaining incriminating information in furtherance of the principal's prosecutorial and investigatory interests.[135] Nevertheless, some courts have found that even where a written agreement creates an agency relationship, the agreement should also provide the names of specific individuals about whom informa-

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131. Once again, this ambiguity arises from the United States Supreme Court's lack of clear parameters in defining agency. While the facts in both *Massiah* and *Henry* involved law enforcement officials expressly pointing out the accused to their informant, nothing in those decisions called for a targeting requirement as a matter of law. *See Henry*, 447 U.S. at 268; Massiah v. United States, 377 U.S. 201, 202-03 (1984). As Maia Goodell asserts,

> [t]he underlying rationale for the *Massiah* and *Henry* line of cases does not support a targeting requirement. Both the pursuit of truth and the normative authority of the criminal court require that the defendants not be subject to questioning by undercover government informants at large, with free rein to question them in the absence of counsel.

Goodell, *supra* note 115, at 2541. Furthermore, in *Henry*, Justice Blackmun observed that "Henry was only one of several federal detainees to whom Nichols was to pay attention; this is not a case in which officers singled out a specific target." *Henry*, 447 U.S. at 285-286 (Blackmun, J., dissenting) (footnote omitted).

132. *See, e.g.*, *Johnson*, 338 F.3d at 921-23; *LaBare*, 191 F.3d at 65; *Birbal*, 113 F.3d at 345-46.

133. United States v. York, 933 F.2d 1343, 1357 (7th Cir. 1991) ("Whether the principal exercises its control strictly, by targeting specific individuals, or casually, by loosing an informant on the prison population at large is irrelevant."), *overruled on other grounds by* Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999); *see also* Commonwealth v. Murphy, 862 N.E.2d 30, 39 (Mass. 2007). Goodell argues that "either an agreement with the informant to provide information about fellow inmates or the targeting of a particular defendant is sufficient to show that the government is responsible for the informant's questioning . . . ." Goodell, *supra* note 115, at 2531.

134. *See supra* notes 106-127 and accompanying text.

135. Goodell asserts that "[o]nce an informant becomes a state agent, pursuant to an agreement to collect information, her actions weigh in on the government side—particularly in the case of the informant at large." Goodell, *supra* note 115, at 2538-39.

tion should be obtained.[136] For instance, in *United States v. Birbal*, the state entered into a plea agreement with an informant, Gabaree, who was to provide "any and all information in his possession relating directly or indirectly to any and all criminal activities or other matters of which he has knowledge."[137] The United States Court of Appeals for the Second Circuit held that in the absence of a provision in the agreement to provide information about Birbal specifically, Gabaree was not acting as a state agent but as an independent entrepreneur when he elicited incriminating statements from the accused.[138]

The Second Circuit's decision in *Birbal* stands in stark contrast to the decisions reached by the United States Court of Appeals for the D.C. Circuit in *United States v. Sampol*[139] and the Massachusetts Supreme Judicial Court in *Commonwealth v. Murphy*.[140] In both *Sampol* and *Murphy*, law enforcement officials entered into written plea agreements with informants who would provide incriminating information about other inmates.[141] Although these agreements did not name the specific individuals to be targeted, both courts held that the informants were state agents whose elicitations of incriminating statements amounted to Sixth Amendment violations.[142] The *Murphy* court expressly determined that a targeting requirement was unnecessary under the Supreme Court's precedents.[143]

Murphy and *Sampol* are consonant with the protective nature of the Sixth Amendment as well as the *Henry* decision. Informants-at-large are clearly motivated to obtain incriminating information and do not require police to instruct them to inform on a particular subject. Jails are filled with individuals awaiting trial who are vulnerable to informants seeking to elicit information from them that

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136. *See, e.g.*, *Birbal*, 113 F.3d 342.

137. *Id.* at 344 (internal quotation marks omitted).

138. *Id.* at 346.

139. United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980).

140. Commonwealth v. Murphy, 862 N.E.2d 30 (Mass. 2007).

141. *Sampol*, 636 F.2d at 632-34; *Murphy*, 862 N.E.2d at 34.

142. *Sampol*, 636 F.2d at 636-38; *Murphy*, 862 N.E.2d at 46. *Murphy* was significant because, although the agreement was with federal agents, the information was used by state prosecutors. *See Murphy*, 862 N.E.2d at 35. On appeal, the Commonwealth argued that because the informant's agreement was with the federal government, he was not an agent of the Commonwealth. *Id.* The court's holding is an important elaboration of Sixth Amendment jurisprudence in that an agency relationship between an informant and federal government authorities can be imputed to state authorities, and, presumably, vice versa. *See id.*

143. *Murphy*, 862 N.E. 2d at 39.

can be used at trial. In order to properly protect inmates from the state's circumvention of their Sixth Amendment rights, all jurisdictions in the United States should find an agency relationship where law enforcement officials form agreements with their agents, written or otherwise, without specifying a specific accused.

Some prosecutors and police officers develop significant relationships with jailhouse informants where the latter are regularly rewarded for providing incriminating information about other inmates, even in the absence of any formal agreement identifying a targeted defendant.[144] In *United States v. Johnson*, the prosecutor made a concerted effort to place a notorious defendant in the same detention facility with his prized informant, McNeese, with the specific intent that McNeese would elicit incriminating statements from her.[145] The prosecutor never communicated to McNeese that he wanted information about Johnson.[146] Nevertheless, just as expected, McNeese established a friendly rapport with Johnson and was able to garner her trust, leading to her making incriminating statements to him.[147] The Eighth Circuit, viewing the factual tableau narrowly, determined that there was no state agency relationship, and thus no Sixth Amendment violation.[148]

Juxtaposed against the holding in *Johnson* is the Supreme Court of Pennsylvania's decision in *Commonwealth v. Moose*.[149] In *Moose*, the district attorney established an ongoing relationship with an informant named Oglesby who had been incarcerated in a county jail for three years while awaiting sentencing.[150] The Commonwealth delayed sentencing each time Oglesby produced a new confession.[151] Although the district attorney never gave Oglesby

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144. Goodell states: "When government officials encourage an inmate to collect information from jailmates, they deputize an informant at large, commissioning him to gather information from those the government is forbidden by the Sixth Amendment to question out of the presence of counsel." Goodell, *supra* note 115, at 2538.

145. United States v. Johnson, 338 F.3d 918, 919-20 (8th Cir. 2003).

146. *Id.* at 921.

147. *Id.* at 919-20.

148. *Id.* at 919. Daniel Kirsch notes that the *Johnson* decision

> severely limits a defendant's protections against the government's intentional use of implicit, or "wink and nod," agreements with undercover informants to circumvent the right to counsel. Although the court's decision may further the interests of effective law enforcement, the resulting sacrifice of fair play in the adversarial justice system is too costly for society to bear.

Daniel Kirsch, *The Prosecutor Circumvents the Sixth Amendment Right to Counsel with a Simple "Wink and Nod"*, 69 MO. L. REV. 553, 553 (2004).

149. Commonwealth v. Moose, 602 A.2d 1265 (Pa. 1992).

150. *Id.* at 1270.

151. *Id.*

specific instructions to procure incriminating information, the court determined that Oglesby knew that he had to procure such confessions while in jail in order to get a good recommendation at his sentencing.[152] Determining that this arrangement created a principal-agent relationship, the court stated:

> [i]t is not significant that Oglesby was not planted for the purpose of gaining information from a targeted defendant. The fact that the Commonwealth intentionally left him there to harvest information from anyone charged with a crime and awaiting trial is the villainy. The vast majority of people in county jail are charged with crimes and awaiting trial and they have a right to counsel when interrogated about the crimes with which they are charged.[153]

The *Moose* decision represents an important position in favor of closing a major loophole left open by the United States Supreme Court. The Court's failure to provide clear guiding principles on the determination of state agency has created tensions among various courts throughout the United States applying the Sixth Amendment.

To date, the Supreme Court of Canada has not addressed the issue of whether the state must specifically identify the accused.[154] Yet the absence of a targeting requirement has not created anything that resembles the disparate approaches in United States courts. To recall, the Supreme Court of Canada's legal test for determining state agency under s. 7 focuses on the material impact of the state's intervention on the exchange between the accused and the informant.[155] This analysis leaves open the question whether the state's intervention can "materially impact" an exchange if the state agent is not even made aware that the state wants to obtain information from a specific accused.

Furthermore, the facts of *Hebert*, *Broyles*, and *Liew* seem to imply that a specific targeting requirement is called for to deter-

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152. *Id.*

153. *Id.*

154. It is notable that in a pre-*Broyles* decision, *R. v. Gray*, the Ontario Court of Appeal held that an informant who worked for the police on other matters was not a state agent when he elicited incriminating statements without explicit instructions. *See* R. v. Gray, 4 O.R.3d 33, ¶¶ 33-35 (Ont. C.A. 1991) (Can.), *available at* 1991 Carswell Ont 691 (Westlaw). However *Broyles*, which was decided after *Gray*, provided more expansive coverage of what constitutes a "police agent." *See* Tanovich, *supra* note 54, at 27-28 (discussing the *Gray* decision and the *Broyles* factors).

155. *See supra* notes 101-108 and accompanying text.

mine state agency.[156] In *Hebert* and *Liew*, the state agents were both undercover police officers and there was no question of their status as agents of the state, nor was there any question that the officers were seeking to acquire information from the identified defendants.[157] Undercover police officers are not likely to be sent into the jailhouse environment as agents-at-large, but are sent in to acquire information about specific individuals. In *Broyles*, the state agent, Ritter, who was the accused's friend, was explicitly requested by the authorities to provide them with any incriminating statements made by Broyles.[158]

However, there is also language in *Broyles* which suggests that a specific targeting requirement may not be required. The *Broyles* Court noted, there may be circumstances where the state makes it known to a jailhouse informant that it will reward the informant for acquiring incriminating information about others within the jailhouse context and that such actions may constitute a material intervention.[159] The test in such circumstances is "would the exchange between the informer and the accused have taken place but for the inducements of the authorities?"[160] It is feasible in such contexts that law enforcement officials may suggest to a potential informant that they are interested in receiving information generally about others but not specify a particular accused. In such circumstances, it would be consistent with a purposive approach to s. 7 to protect the interests of vulnerable defendants, despite the absence of any specific targeting by the state.

A requirement that state agents be instructed to obtain incriminating statements from a specific accused, however, may, for the most part, be a moot issue in Canadian Charter jurisprudence. Among the many cell-plant interrogation cases, at least since the time *Hebert* was decided, a large number have involved the use of undercover police officers as state agents.[161] The specific targeting

156. R. v. Liew, [1999] 3 S.C.R. 227 (Can. 1999), *available at* 1999 CarswellAlta 821 (Westlaw); R v. Broyles, [1991] 3 S.C.R. 595 (Can. 1991), *available at* 1991 CarswellAlta 212 (Westlaw); R. v. Hebert, [1990] 2 S.C.R. 151 (Can. 1990), *available at* 1990 CarswellYukon 7 (Westlaw).

157. *Liew*, [1999] 2 S.C.R. 227, ¶ 7; *Hebert*, [1990] 2 S.C.R. 151, ¶ 53.

158. *Broyles*, [1991] 3 S.C.R. 595, ¶ 41.

159. *Id.* ¶¶ 30-32.

160. *Id.* ¶ 32.

161. *See, e.g.*, *Liew*, [1999] 3 S.C.R. 227; R. v. Brown, [1993] 2 S.C.R. 918 (Can. 1993), *available at* 1993 CarswellAlta 412 (Westlaw); *Hebert*, [1990] 2 S.C.R. 151; R. v. Spanevello, 51 B.C.L.R.3d 192 (B.C.C.A. 1998) (Can.), *available at* 1998 CarswellBC 1129 (Westlaw); R. v. Bell, 92 B.C.A.C. 275 (B.C.C.A. 1997) (Can.), *available at* 1997 CarswellBC 1384 (Westlaw); R. v. Kiloh, 2003 B.C.S.C. 209 (B.C. Sup. Ct. 2003) (Can.),

requirement is germane to the context of jailhouse informants who elicit information. However, it does not arise when the state agents are police officers. Where undercover police officers have conversations with suspects in custody, the *Broyles* Court expressly stated, "it is clear that the conversation" between the accused and the undercover police officer "would not have taken place but for the intervention of the officer."[162]

Given the onerous challenges that an accused must face in order to demonstrate "active elicitation" under *Broyles*, it appears that Canadian law enforcement agencies have been willing, in many instances, to forego any potential challenges to state agency by their frequent use of undercover police officers. Conversely, given the more flexible nature of the deliberate elicitation standard in the United States, law enforcement officers have taken advantage of the unclear parameters set by the United States Supreme Court in determining state agency. In several United States jurisdictions, officers have effectively managed to circumvent an accused's Sixth Amendment right to counsel by employing jailhouse informants.[163]

IV. ELICITATION

The second key element that an American or Canadian defendant must prove in order to show that the state violated her constitutional rights through a cell-plant interrogation is that its agent *elicited* the incriminating statements. In the United States, the elicitation must be "deliberate," indicating intentional conduct.[164] Under Canadian law, the state agent must "actively" elicit the in-

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available at 2003 CarswellBC 326 (Westlaw); R. v. Ertmoed, 2002 B.C.S.C. 806 (B.C. Sup. Ct. 2002) (Can.), *available at* 2002 CarswellBC 3701 (Westlaw); R. v. Pritchard, 2002 B.C.S.C. 453 (B.C. Sup. Ct. 2002) (Can.), *available at* 2002 CarswellBC 3532 (Westlaw); R. v. Van Osselaer, 2000 B.C.S.C. 1065 (B.C. Sup. Ct. 2000) (Can.), *available at* 2000 CarswellBC 2648 (Westlaw); R. v. Skinner, 84 Man. R.2d 223 (Man. Q. B. 1992) (Can.), *available at* 1992 CarswellMan 157 (Westlaw); R. v. Jackson, 51 O.A.C. 92 (Ont. C.A. 1991) (Can.), *available at* 1991 CarswellOnt 119 (Westlaw); R. v. Graham, 1 O.R.3d 499 (Ont. C.A. 1991) (Can.), *available at* 1991 CarswellOnt 77 (Westlaw); R. v. Jenkins, Chatham 2049/00, 2000 WL 31978665 (Ont. S.C.J. 2002) (Can.), *available at* 2002 CatswellOnt 6175 (Westlaw); R. v. Moulton, [1999] O.J. No. 661 (Ont. C.J. Gen. Div. 1999) (Can.), *available at* 1999 CarswellOnt 593 (Westlaw); R. c. Caron, Laval 540-01-16962-022 (Que. Sup. Ct. 2004) (Can.), *available at* 2004 CarswellQue 7529 (Westlaw).

162. *Broyles*, [1991] 3 S.C.R. 595, ¶ 31.

163. *See, e.g.*, United States v. Johnson, 338 F.3d 918, 919-20 (8th Cir. 2003); *see also supra* notes 145-147 and accompanying text.

164. *See, e.g.*, United States v. Henry, 447 U.S. 264, 270 (1980); Massiah v. United States, 377 U.S. 201, 206 (1964).

criminating statements, implying both intentionality and perhaps substantial or vigorous conduct.[165] As this section will demonstrate, the United States juridical approach to deliberate elicitation is more flexible than its approach to state agency, allowing for less active forms of eliciting conduct.[166] Conversely, while the Supreme Court of Canada articulated more generous factors to determining state agency, it has placed more significant hurdles in the way of the accused to prove that the incriminating statement was actively elicited.[167] In determining "active" elicitation, Canadian courts look specifically to both the nature of the exchange and the nature of the relationship between the accused and the state agent.[168]

A. *Nature of the Exchange*

1. Language of the Legal Tests

The United States Supreme Court has held that a "defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."[169] While the test recognizes an active/passive distinction and requires the state agent to cross the constitutional threshold by engaging in some action, it does not require that the conduct rise to the level of a formal interrogation or its functional equivalent.[170] Furthermore, the test not only looks at the conduct of the state agent, but also the conduct of the police (in perhaps arranging for the elicitation to take place).[171] This would seem to require courts to examine the totality of the state's conduct.

By contrast, the Supreme Court of Canada assesses the nature of the exchange between the accused and the state agent with reference to the following factors from *Broyles*: "[d]id the state agent actively seek out information such that the exchange could be characterized as akin to an interrogation, or did he or she conduct his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have

165. *See, e.g.*, *Broyles*, [1991] 3 S.C.R. 595, ¶ 35.

166. *See infra* Part IV.A.2.

167. *See infra* Part IV.A.3.

168. *See, e.g.*, *Broyles*, [1991] 3 S.C.R. 595.

169. Kuhlmann v. Wilson, 477 U.S. 436, 458 (1986).

170. *See* Fellers v. United States, 540 U.S. 519, 524-25 (2004). The distinction between deliberate elicitation and interrogation, however, has not always been clear. *See* James J. Tomkovicz, *Reaffirming the Right to Pretrial Assistance: The Surprising Little Case of* Fellers v. United States, 15 WM. & MARY BILL RTS. J. 501, 509-30 (2006).

171. *See Kuhlmann*, 477 U.S. at 458 (holding that the defendant must show that "the police . . . took some action").

done?"[172] The language of this test clearly stresses greater activity on the part of the state agent that calls, in effect, for the accused to demonstrate that the agent took *significant action* to procure the impugned statements. Also, these *Broyles* factors myopically focus on the conduct of the state agent, but do not look at the overall actions of both the state and its agent.

2. United States Jurisprudence

Although the concept of deliberate elicitation has been applied in the Sixth Amendment context since the United States Supreme Court's 1964 decision in *Massiah*, the Court defined deliberate elicitation for the first time in *Kuhlmann v. Wilson* in 1986.[173] In *Massiah*, the Court described the exchange between Massiah and Colson, the state's agent, as a "conversation" but never mentioned what specific statements Colson may have made to elicit the inculpatory statements from Massiah.[174] The *Henry* Court similarly did not define elicitation.[175] Factually, there was no indication as to what the informant actually said to elicit Henry's incriminating remarks or who initiated the conversations that led to the statements being made.[176] Fundamentally, *Henry* focused on whether the state "intentionally *creat*[*ed*] *a situation likely to induce* Henry to make incriminating statements without the assistance of counsel."[177] Furthermore, the Court observed that "confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents."[178] Thus, "the incriminating conversations between Henry and Nichols were facilitated

172. *Broyles*, [1991] 3 S.C.R. 595, ¶ 38.

173. *See Kuhlmann*, 477 U.S. at 458.

174. Colson was actually arrested with Massiah for the trafficking of narcotics. Prior to their conversation, which took place in Colson's car, Colson brokered a deal with the state where he would plead guilty and assist in acquiring incriminating statements from Massiah. *See Massiah*, 377 U.S. at 202-03.

175. *See generally* United States v. Henry, 447 U.S. 264 (1980).

176. Justice Blackmun, in his dissenting opinion, wrote:

> We know nothing about the nature of these conversations, particularly whether Nichols subtly or otherwise focused attention on the bank robberies. Indeed, to the extent the record says anything at all, it supports the inference that it was Henry, not Nichols, who "engaged" the other "in some conversations," and who was the moving force behind any mention of the crime.

Id. at 288 (Blackmun, J., dissenting); *see also* White, *Interrogation Without Questions*, *supra* note 41, at 1219.

177. *Henry*, 447 U.S. at 274 (majority opinion) (emphasis added).

178. *Id.*

by Nichols' conduct and apparent status as a person sharing a common plight."[179]

As with state agency, United States courts were left to determine the meaning of deliberate elicitation from the facts of *Henry* and other Sixth Amendment cases.[180] Yet, despite the lack of a precise definition, *Henry*'s factual context made clear that the Court was more interested in the mere fact that the state agent engaged in conversation that resulted in the utterance of incriminating statements than whether the agent actively pursued the elicitation. Thus, it was unnecessary to examine the content of the state agent's statements.

In *Kuhlmann*, the Supreme Court articulated its deliberate elicitation test: a "defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."[181] The phrasing of this test naturally leaves open what and how much action is actually required beyond mere listening; this is to be understood within the factual circumstances of each case. In *Kuhlmann*, the accused, Wilson, was arraigned for robbery and murder, which took place at a taxi depot where he worked.[182] Wilson was confined in a jail cell with an informant named Lee, who had a prior arrangement with the state to report any statements made by Wilson, particularly the names of Wilson's accomplices to the crimes.[183] Adding to Wilson's anxieties, and ultimately helping prompt him to speak, was his placement in a jail cell that overlooked the actual

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179. *Id.*

180. The Court dealt with the issue of "deliberate elicitation" in a Sixth Amendment case decided a few years prior to *Henry*, though not in a case involving an undercover police agent. *See* Brewer v. Williams, 430 U.S. 387 (1977). In *Brewer*, two police officers transported an individual suspected of murdering a ten-year-old girl from one city to another. *Id.* at 393. One of the police officers accompanying the suspect (and after the latter's Sixth Amendment rights attached) appealed to the suspect's Christian sensibilities to reveal the location of the girl's body. *Id.* Without asking the suspect any questions, the police officer created a vivid image of the body of the girl he was suspected of killing being buried by a snowstorm and her parents holding a burial with no body. *Id.* The Court determined that the officer's monologue violated the suspect's right to counsel and analogized the officer's deliberate elicitation to an interrogation. *Id.* at 399. It held that the police officer "deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." *Id.* An understanding of the definition emerges from the facts of the case, but like *Henry*, decided a few years later, no factors were articulated. For an insightful discussion on the *Brewer* decision, see Kamisar, *supra* note 72.

181. *See* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986).

182. *Id.* at 439.

183. *Id.*

crime scene.[184] Wilson began to speak "to Lee about the robbery, narrating the same story that he had given the police at the time of his arrest."[185] Lee advised Wilson that the latter's story "didn't sound too good."[186] In a footnote, the Court related a different account of this conversation, observing that during the trial, Lee had said more to Wilson than the Court suggested in the main text of its decision.[187] The footnote stated: "[a]t the suppression hearing, Lee testified that, after hearing respondent's initial version of his participation in the crimes, 'I think I remember telling him that the story wasn't—it didn't sound too good. Things didn't look too good for him.'"[188] When Lee testified at trial, he recalled yet another variation of his original remark, stating, "Well, I said, look, you better come up with a better story than that because that one doesn't sound too cool to me, that's what I said."[189] This narration demonstrates that Lee's statements seemed to be somewhat more extensive than what the Court recounted, and thus it is curious why it limited Lee's testimony to the abbreviated "didn't sound too good."[190]

In the days following this conversation, Wilson allegedly began to change his story. However, the Court's record does not describe the nature of conversations between Wilson and Lee during that period.[191] Wilson received a visit from his brother informing him that family members were upset because they believed Wilson murdered the taxi dispatcher.[192] Emotionally impacted by this meeting, Wilson supposedly revealed his crime to Lee, who surreptitiously took notes and conveyed them to the authorities.[193] Wilson's incriminating statements were then admitted into evidence, and he was convicted.[194]

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184. It is not clear whether the police placed Wilson in that cell intentionally to increase his anxiety or whether it was merely coincidental. However, given that the police placed an agent in the cell to obtain incriminating statements, it seems unlikely that the placement was unintentional. Interestingly, the Court found this fact insignificant and ignored it as mere coincidence. *Id.* at 460 n.24.

185. *Id.* at 439.

186. *Id.* at 439-40 (internal quotation marks omitted). *See generally* Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 J.L. & HUMAN. 1 (2006).

187. *Kuhlmann*, 477 U.S. at 440 n.1.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 440.

192. *Id.*

193. *Id.*

194. *Id.* at 441.

The Supreme Court held that Wilson's right to counsel was not violated under the circumstances of the case, asserting that his comments were "spontaneous" and "unsolicited," notwithstanding Lee's remark that the story "didn't sound too good."[195] The Court simply refused to consider the other versions of Lee's account for the purposes of the deliberate elicitation test. Its articulation of deliberate elicitation being "some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks" was tainted by the Court's misapplication of the test to the facts of *Kuhlmann*.[196] Clearly Lee, by his own testimony, took action beyond mere listening that was designed to elicit incriminating statements, notwithstanding the instructions he was given just to listen.[197] His actions were likely to induce the utterance of an incriminating response. The Court should have properly characterized Lee's response as sufficient for a violation of the elicitation test, and its decision evidences that the active/passive distinction could lead to problematic results.[198] Moreover, the Court's narration of the facts was faulty not solely for its willful blindness to Lee's testimonial acknowledgment of what he said to Wilson. It was compounded by its failure to consider the likelihood that over the course of a few days of shared confinement, this would not be the only thing that Lee said to induce Wilson to reveal incriminating information about his crime.[199] As Justice Brennan astutely observed in his dissenting opinion, a Sixth Amendment analysis

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195. *Id.* at 460.

196. *See id.* at 459.

197. Recall that in *Henry*, Nichols was also instructed just to listen, but failed to follow the instructions. *See* United States v. Henry, 447 U.S. 264, 271 (1980) ("The Government argues that the federal agents instructed Nichols not to question Henry about the robbery."). The Court also held that the state controls the agent and cannot benefit from the agent's disobedience. *Id.* at 271-74.

198. The Court's emphasis on the active/passive character of the elicitation creates certain analytical problems. In order to determine whether a state agent actively elicited incriminating statements or was a passive listener, courts, absent any recordings, must rely upon the self-serving testimony of the informant and the accused. *See* April Leigh Ammeter, Kuhlmann v. Wilson*: "Passive" and "Active" Government Informants*—A Problematic Test, 72 IOWA L. REV. 1423, 1435-36 (1987); Matthew J. Merritt, *Jailhouse Informants and the Sixth Amendment: Is the U.S. Supreme Court Adequately Protecting An Accused's Right to Counsel?*, 44 B.C. L. REV. 1323, 1348-49 (2003).

199. Justice Brennan also notes in his dissent: "Lee encouraged [Wilson] to talk about his crime by conversing with him on the subject over the course of several days and by telling [Wilson] that his exculpatory story would not convince anyone without more work." *Kuhlmann*, 477 U.S. at 475 (Brennan, J., dissenting). It is unclear whether this was something that Justice Brennan inferred or was based upon some fact stated in the parties' submissions.

required a more complete review of "the entire course of government" conduct.[200]

However, a recent Sixth Amendment case may be signaling a shift towards a broader understanding of deliberate elicitation. In *Fellers v. United States*, two non-undercover police officers went to the accused's home to arrest him.[201] Fellers invited the two officers into his house.[202] After the officers entered, they advised him that they had a federal warrant for his arrest following a grand jury's indictment for conspiracy to distribute methamphetamines.[203] The officers advised Fellers that the indictment named four other individuals.[204] Unprompted by the officers, Fellers admitted to knowing the four individuals and to using methamphetamines during his association with them.[205]

The Supreme Court unanimously held that the officers deliberately elicited Fellers's remarks in violation of his Sixth Amendment right to counsel, given that he was indicted at the time of the encounter.[206] By informing the accused of the charges and the names of the others indicted, the officers conduct went beyond mere listening, thus deliberately eliciting the incriminating statements. Yet, in light of the outcome in *Kuhlmann*, the conduct of the *Fellers* police officers does not appear to rise to the level of sufficiently active conduct. The *Fellers* case, through its facts, has perhaps restored a broader interpretation of "deliberate elicitation," one that requires less action to satisfy the deliberate elicitation test.

3. Canadian Jurisprudence

Juxtaposed against these United States Supreme Court interpretations of elicitation are those advanced by the Supreme Court of Canada. The latter's first application of the s. 7 right to silence to cell-plant interrogation was in *R. v. Hebert*.[207] In *Hebert*, the accused was arrested for robbery.[208] After being advised of his right to counsel and consulting with a lawyer, Hebert refused to make a

200. *Id.* at 476.
201. Fellers v. United States, 540 U.S. 519, 521 (2004).
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 524-25.
207. R. v. Hebert, [1990] 2 S.C.R. 151 (Can. 1990), *available at* 1990 Carswell Yukon 7 (Westlaw).
208. *Id.* ¶ 13.

statement and was placed in a jail cell.[209] The authorities placed an undercover police officer in the cell with Hebert, who successfully elicited incriminating statements from him.[210] The Court arrived at the conclusion that Hebert's right to silence was violated without reviewing a specific transcript of the exchange.[211] This may indicate that the Court purposely sought to produce a broad interpretation of elicitation.

In *R. v. Broyles*, decided the following year, the Court held that the exchange between the accused and the state's agent (the accused's friend), Ritter, was the functional equivalent of an interrogation and that Ritter directed the conversation to areas where the state wanted information and did not allow the conversation to "flow naturally."[212] During the course of their exchanges, Ritter made statements disparaging Broyles's counsel, which the Court asserted undermined Broyles's right to counsel.[213]

Broyles contributed to the case law on cell-plant interrogations by providing a more developed factual context by way of transcripts of the Broyles-Ritter conversation.[214] Subsequent courts could look to the transcribed dialogue in *Broyles* and gauge the degree of "active" elicitation required to find a violation of s. 7 in cases before them. However, while providing a factual context, *Broyles*

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209. *Id.*

210. *Id.*

211. A review of some of the immediate post-*Hebert* cases suggests that some lower courts were not prepared to view the absence of a transcript as an invitation to perceive elicitation in a more flexible manner. *See, e.g.*, R. v. Gray, (1991) 4 O.R. (3d) 33, *available at* 1991 CarswellOnt 691 (Westlaw); R. v. Graham, (1991) 1 O.R. (3d) 499, *available at* 1991 CarswellOnt 77 (Westlaw).

212. R. v. Broyles, [1991] 3 S.C.R. 595, ¶ 42 (Can. 1991), *available at* 1991 CarswellAlta 212 (Westlaw). The following excerpt of a conversation that occurred between the accused and the informant demonstrates the court's findings:

> BROYLES: Like I, I already said stuff and whatnot. There's really no more that I can say.
> RITTER: You could admit to them that you killed her.
> BROYLES: But I didn't.
> RITTER: Are you sure?
> BROYLES: Yeah.
> RITTER: You weren't out on drugs or nothing.
> BROYLES: No.
> RITTER: That you don't remember. That you would have lost control.
> BROYLES: No.

Id.

213. *Id.* ¶¶ 43-44 ("The right to counsel would indeed be meaningless if the authorities were entitled to undermine the confidence of the accused in his counsel in order to extract a confession.").

214. *Id.* ¶ 42.

also set an onerous standard for an accused to prove active elicitation by suggesting that an agent must issue a series of probing questions—akin to an interrogation or its functional equivalent—in order for the nature-of-the-exchange factors to be met.[215] The following two cases illustrate that a state agent's questioning need not be as "active" as Ritter's questioning in *Broyles*, yet could be just as effective given an accused's ignorance of the fact that he is speaking to an undercover state agent and the coercive impact of the detention environment where the questioning takes place.

Some years after his first brush with cell-plant interrogations, which brought his case to the Supreme Court of Canada, Broyles was once again arrested, this time for the murder of his common-law spouse.[216] While in detention pending trial, a jailhouse informant who had no previous relationship with Broyles developed a friendship with him over the course of thirteen days.[217] During that period, the informant gave Broyles cigarettes and protected him when he was attacked by other inmates.[218] Following an emotional visit by his mother and his pastor, Broyles sought out his new jailhouse friend to vent his angst.[219] Seeing Broyles upset, the informant grabbed two juice bottles and both he and Broyles went into a corner to talk.[220] The informant then asked, "What's the matter?"[221] Broyles replied that "he wished that he never did what he did again."[222] The informant asked, "What do you[ ] mean?" Broyles then replied, "I wish I never had strangled her, but the bitch was always fighting and nagging on me."[223] Broyles's com-

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215. The anxieties inherent to detention can make it so that such probing questions are unnecessary to elicit incriminating responses. *See* discussion *supra* notes 17-20 and accompanying text.

216. R. v. Broyles (*Broyles II*), 312 A.R. 31, ¶¶ 3-4 (Alta C.A. 1999) (Can.), *available at* 1999 CarswellAlta 341 (Westlaw). *Broyles II*, as used here, is not subsequent history to *Broyles*, but is referred to as such to distinguish the two cases.

217. The informant was instructed to be a "potted plant," meaning that "he was not to interrogate the appellant." *Id.* ¶ 7.

218. *Id.*

219. *Id.* ¶ 16.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* This was essentially the account of the exchange as told to the detective, who then provided this account as a witness. *See id.* This account, however, is different from the version that the informant relayed when he testified. The court stated that the informant claimed that after Broyles's mother visited, Broyles "felt really bad that he had let his mom down, that this had all happened, again. And it was at this point that he brought to my attention that he said he had strangled an individual." *Id.* The two accounts, while similar substantively, are markedly different when examining the over-

ments were admitted into evidence by the trial court justice, and the Alberta Court of Appeal ultimately affirmed the trial court's decision that the responses were not elicited through the functional equivalent of an interrogation.[224]

While it is clear that the informant merely asked Broyles what the latter meant when he said that "he wished that he never did what he did again," his question was clearly calculated and likely to elicit an incriminating response, particularly since it was coming from a trusted friend and jailhouse protector.[225] Viewing the facts in context, the informant did not have to engage in a long series of questions to elicit information, for Broyles was already in a rather vulnerable state.[226] Interrogations do not require lengthy interrogative statements; even short and concise ones may lead to the responses that the interrogator is seeking to obtain. Furthermore, imagine in a similar scenario if a non-undercover police officer were to ask "what do you mean" to an individual like Broyles, who, in a guilt ridden state, had just uttered that he regretted what he had done. If the accused has not been informed either of his right to counsel or silence, the courts should certainly construe the question as eliciting an incriminating statement. Just as non-undercover police officers do not have to engage in lengthy banter to elicit incriminating statements, neither should undercover police officers.

In 1999, the Supreme Court handed down its decision in *R. v. Liew*, which placed more significant hurdles in the way of an accused who is seeking to demonstrate a s. 7 violation.[227] The case involved an undercover police officer, Jones, who elicited incriminating statements from the accused while they were in custody at

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all context and, moreover, the role of the informant in this dialogue who asked the accused questions to elicit the incriminating response. *Id.* Reading the informer's testimony, one could certainly surmise that Broyles provided all the incriminating information in an unsolicited manner. Absent as well from the informer's account is the fact that he took two drinks and went into the corner to talk about what was upsetting Broyles. *Id.* In so doing, the informer set up a private moment between friends that induced Broyles to admit his sorrow and guilt. *Id.* The informant's account also reveals the problems of relying on the testimony of an informant in the absence of a recording device.

224. *Id.* ¶ 17. The trial court found that the informant was not a state agent and thus did not engage in an analysis of the elicitation question. *Id.* ¶ 13. The Court of Appeal determined that while the informant was a state agent, the statements procured were not the product of an active elicitation. *See id.* ¶¶ 17-18.

225. *See id.* ¶ 16.

226. *See id.*

227. R. v. Liew, [1999] 3 S.C.R. 227 (Can. 1999), *available at* 1999 CarswellAlta 821 (Westlaw).

the police station after their arrests during an undercover drug sting operation.[228] Following the arrests, Jones continued to play his undercover role and was transported in the same squad car with Liew.[229] At the police station, Jones and Liew were placed in a room together where Liew initiated general conversation with Jones about the crime for which they were both arrested.[230] Jones then shifted the conversation to a specific area of inquiry whereupon Liew made incriminating statements.[231] These were admitted into evidence, and Liew was convicted.[232]

The Supreme Court held that Jones did not actively elicit Liew's incriminating statements.[233] Focusing on the nature of the exchange, the Court asserted that when Jones asked "[w]hat happened?" and further stated "[t]hey got my fingerprints on the dope," he was merely following the "natural flow of the conversa-

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228. *Id.* ¶¶ 8-16.

229. *Id.* ¶¶ 10-11.

230. *Id.* ¶¶ 12-16.

231. *Id.* ¶ 14.

232. *Id.* ¶¶ 17, 24. Their conversation is reproduced below with the italicized portions representing the contested portions that Liew sought to have excluded:

APPELLANT: That Lee is hot.
JONES: What?
APPELLANT: That Lee is hot.
JONES: Fuck.
APPELLANT: Did you pass the money?
JONES: Fuck. The cops got it.
APPELLANT: How much?
JONES: $48,000.00
APPELLANT: Ah, fuck.
JONES: *What happened?*
APPELLANT: *The cops watching us.*
JONES: *Yeah. They got my fingerprints on the dope.*
APPELLANT: *Lee and me too.*
JONES: Why the fuck didn't you give it to me out of the black car? Why did you drive away?
APPELLANT: That the other guy. That not my dope. I just give it to Lee and drop him off. We very careful.
JONES: The cops must have been following you guys.
APPELLANT: No we were very careful but Lee very hot.
The appellant then asked about the $48,000 and the conversation continued:
JONES: Fuck man, they're going to kill me for this man.
APPELLANT: Where are you from?
JONES: From Slave Lake.
APPELLANT: Whose money?
JONES: Indians from up there. Fuck man, my prints, Lee's prints and your prints are on the shit.
APPELLANT: Yeah.

Id. ¶¶ 14-15 (emphasis added).

233. *Id.* ¶¶ 47-51.

tion" initiated by the accused.[234] Chief Justice Lamer, sitting as the sole dissenter, argued that Jones redirected the conversation from one about money, albeit initiated by the accused, to the issue of possession of narcotics, which resulted in his making the incriminating statement.[235] Thus, according to the Chief Justice, Jones did not merely follow the "natural flow" of the conversation.[236] Although Jones did not phrase his statement about the fingerprints as an interrogative statement, it was nevertheless a comment intended to elicit an incriminating response.[237]

The nature of the exchange factors first discussed in *Broyles*,[238] and applied in *Broyles II*[239] and *Liew*,[240] demonstrate that an accused must show a significant degree of "active" conduct in order for courts to find that the agent elicited incriminating statements from the defendant. Unfortunately, unlike the United States Supreme Court, the Supreme Court of Canada has neglected to take into account the impact of the detention environment on an accused and how state agents may unfairly exploit such considerations to their advantage.[241] Gordon Wall has argued that "[w]here a suspect is confined in prison, a [more] contextualized approach [to elicitation] would take account of the impact of confinement by the state."[242] Given the nature of the detention environment, the degree of elicitation required to procure incriminating statements from incarcerated suspects pending trial should not need to rise to the level of a formal interrogation or its functional equivalent.

The Supreme Court of Canada's understanding of cell-plant interrogations and their functional equivalent needs to be revisited.

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234. *Id.* ¶¶ 48-49.

235. *Id.* ¶¶ 3-5 (Lamer, C.J., dissenting).

236. *Id.* ¶ 5.

237. *Id.*

238. R. v. Broyles, [1991] 3 S.C.R. 595, ¶¶ 37-39 (Can. 1991), *available at* 1991 CarswellAlta 212 (Westlaw).

239. *See* R. v. Broyles (*Broyles II*), 312 A.R. 31, ¶¶ 14-18 (Alta C.A. 1999) (Can.), *available at* 1999 CarswellAlta 341 (Westlaw).

240. *See Liew*, [1999] 3 S.C.R. 227, ¶¶ 47-55.

241. *See* R v. Hebert, [1990] 2 S.C.R. 151, ¶¶ 12, 27 (Can. 1990), *available at* 1990 CarswellYukon 7 (Westlaw) (Sopinka, J., concurring).

242. Gordon Wall, The Pre-Trial Right to Silence in Canada and the United Kingdom 49 (Sept. 1995) (unpublished LLM thesis, Queen's University) (on file with the Western New England Law Review). Wall offered the following test for courts to consider as part of the *Broyles* nature of the exchange of factors: "Considering all the circumstances of the exchange between the accused and the state agent, is there a causal link between the conduct of the state and/or its agents (including confining the accused in prison) and the making of the statement by the accused?" *Id.* at 50; *see also* Tanovich, *supra* note 54, at 31.

Although the *Liew* Court held that an "atmosphere of oppression" need not be present during a cell-plant interrogation in order for s. 7 to be violated,[243] the *Broyles* Court's reliance on the transcript of Ritter's interrogation of Broyles suggests that an interrogation should constitute a series of persistently asked questions (as in *Broyles*) that may fall short of "oppression."[244] In a normal interrogation environment, an accused is aware that she is speaking with police officers, and she may exert a significant degree of resistance that a police officer conducting the interrogation will have to overcome.

In contrast, in a cell-plant interrogation, the accused's ignorance of the fact that she is speaking with a state agent will likely induce her to drop her guard, thus making it unnecessary to pursue the type of active interrogation questioning to which Ritter subjected Broyles.[245] According to a significant police interrogation manual, a "principal psychological factor contributing to a successful interrogation is *privacy*" and the absence of any "usual police surroundings" that will remind the accused that she is in an interrogation room.[246] Furthermore, law enforcement officers are advised to give the impression that they are merely seeking the truth; they are not investigators seeking a conviction.[247] A cell-plant interrogation includes all of these elements, which is why law enforcement agents favor their use. When the object of the exchange is to elicit incriminating statements, regardless of the form, the substance remains the same—interrogation.

B. *Nature of the Relationship*

All actions taken in life are understood within a particular factual (and cultural) context and it is this context that helps to shape and give actions their meaning. The relationship between an accused and the state agent can have an impact on the manner in which statements are elicited. For example, subtle remarks may elicit an incriminating statement between two close friends although similar remarks may not evoke the same response in another context. In some traditional custodian interrogations, police

243. *See Liew*, [1999] 3 S.C.R 227, ¶ 37.

244. *See Broyles*, [1991] 3 S.C.R. 595, ¶ 42.

245. *Id.*

246. FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 1, 7 (1962).

247. *Id.* at 13.

officers will attempt to befriend an accused.[248] If the police officer is significantly older than the accused, the officer may foster a maternal or paternal relationship to elicit an incriminating response.[249] Therefore, just as environmental factors such as the detention context need to be considered, so too should the relationship of the agent and the accused have some bearing on interpreting the impact of the conduct that results in the utterance of the incriminating responses.

While the United States Supreme Court in *Henry* considered how confinement may impact the elicitation of incriminating statements in the detention context (although it seemed to have ignored it altogether in *Kuhlmann*), it has not mandated an analysis of the nature of the relationship between the state agent and the accused or how that relationship may have impacted the elicitation.[250] In *Kulhmann*, the informant, Lee, spent a few days in the cell with the accused, Wilson, and although a relationship of trust may have developed, it was of no moment to the Court when it held that Lee did not elicit Wilson's incriminating statements. However, in his dissenting opinion, Justice Brennan observed, "[t]he informant, while avoiding direct questions, nonetheless developed a relationship of cellmate camaraderie with respondent and encouraged him to talk about his crime."[251] Yet the Court chose to ignore this relationship in its analysis, including how that relationship may have

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248. *See* White, *Police Trickery*, *supra* note 26, at 615 n.243.

249. *See* State v. Woods, 345 N.W.2d 457, 472 (Wis. 1984); *see also* White, *Police Trickery*, *supra* note 26, at 615.

250. In two decisions prior to *Kuhlmann*, however, there are hints that suggest that the relationship between the state agent and the accused may have been of some consideration to the Court. For instance, when the Supreme Court affirmed the Fourth Circuit's decision in *Henry*, it specifically noted the lower court's observation that whether "by association, by general conversation, or both, [the informant] had developed a relationship of trust and confidence with Henry such that Henry revealed incriminating information." United States v. Henry, 447 U.S. 264, 269 (1980). Such interference amounted to a violation of Henry's Sixth Amendment right to counsel. *Id.* However, it did not further address the issue in its own opinion. Subsequently, in *Maine v. Moulton*, a case where the state's informant, Colson, was the co-defendant in a criminal prosecution involving the accused, the Court held that Colson elicited incriminating statements from Moulton. Maine v. Moulton, 474 U.S. 159 (1985). In a footnote, the Court observed that Colson and Moulton's relationship as co-defendants could impact upon the elicitation. It stated: "Because Moulton thought of Colson only as his co-defendant, Colson's engaging Moulton in active conversation about their upcoming trial was certain to elicit statements that Moulton would not intentionally reveal—and had a constitutional right not to reveal—to persons known to be police agents." *Id.* at 176 n.13.

251. Kuhlmann v. Wilson, 477 U.S. 436, 476 (1986) (Brennan, J., dissenting).

impacted the actions Lee took to elicit the incriminating statements from Wilson.

In contrast, the Supreme Court of Canada expressly examines the "nature of the relationship" between the accused and the state agent to identify whether the agent has exploited a relationship of trust between the two.[252] As articulated in *Broyles*, a court must ask:

> Did the state agent exploit any special characteristics of the relationship to extract the statement? Was there a relationship of trust between the state agent and the accused? Was the accused obligated or vulnerable to the state agent? Did the state agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?[253]

These factors, emphasizing a relationship of trust between the defendant and the state agent, fail to specifically address how such relationships critically impact the actual exchange and may produce incriminating information. These factors also suggest that an accused must demonstrate that the state agent has used a pre-existing or developed relationship of trust to extract incriminating statements. In *Broyles*, the Court determined that Ritter used his pre-existing relationship of trust with the accused to manipulate the latter into eventually inculpating himself.[254]

A relationship of trust can be a crucial (and perhaps dispositive) factor in determining the existence of a violation of s. 7. For instance, in *R. v. Jackson* an undercover female police officer, Slack, developed a relationship of trust with the accused, who was incarcerated pending trial.[255] Posing as a student interested in the judicial system, Slack attended Jackson's preliminary enquiry and was instructed to develop a relationship with the spouse of Jackson's co-accused.[256] Jackson expressed interest in Slack, who was later instructed by her superiors to visit Jackson in jail and maintain her cover as a student.[257] Slack visited Jackson six times over the course of six months, with each session lasting sixty to ninety minutes in duration, supplemented with numerous exchanges of corre-

252. *See, e.g.*, R v. Broyles, [1991] 3 S.C.R. 595 (Can. 1991), *available at* 1991 CarswellAlta 212 (Westlaw).

253. *Id.* ¶ 39.

254. *Id.* ¶ 43.

255. R. v. Jackson, 51 O.A.C. 92, ¶ 45 (Ont. C.A. 1991) (Can.), *available at* 1991 CarswellOnt 119 (Westlaw).

256. *Id.* ¶ 31.

257. *Id.* ¶ 32.

spondence during that period.[258] When Jackson expressed a sexual interest in Slack, she did nothing to dissuade him.[259] Although most of their conversations were unrelated to Jackson's alleged crime, Slack was able eventually to elicit incriminating statements from Jackson through their developed relationship of trust, which was used to convict him.[260] The Ontario Court of Appeal held that Jackson's right to silence was infringed and the evidence should have been excluded under s. 24(2).[261] It determined that Slack nurtured a relationship of trust with Jackson and noted the "strong sexual overtones" that imbued the relationship, particularly from Jackson's perspective.[262] The court viewed this as "a strong invitation to Jackson to impart confidential matters to her in order to buttress that relationship."[263]

Jackson does not mandate that the accused and the informant interact for six months before a trust relationship can be developed. *R. v. Brown* suggests that this relationship can be established within a shorter, yet more concentrated time frame.[264] In *Brown*, an undercover police officer, Jones, was housed in the same cell with the accused for at least a thirty-hour period.[265] Despite having no preexisting relationship, Jones developed a relationship of trust by portraying himself as an experienced criminal who had beaten "the rap" himself.[266] Posing as a fellow criminal, Jones made Brown believe that he had friends outside who could silence witnesses, hide evidence, or take the fall on Brown's behalf for an appropriate fee.[267] Jones furthermore expressed an adversarial "us versus the cops" relationship.[268] Although the Alberta Court of Appeal held that Brown's right to silence was not violated, the Supreme Court reversed, basing its decision substantially on the dissenting opinion

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258. *Id.* ¶¶ 32, 34.

259. *Id.* ¶ 33.

260. *Id.* ¶ 34. Slack testified that during one of her conversations with Jackson, he had admitted his involvement in the alleged murder, confiding that he and his co-accused had planned the murder together and had done it for money. *Id.* ¶ 36. On a subsequent visit, Jackson again told Slack that he had killed the victim and disclosed that he had buried the clothes he had worn on the night of the murder at a location found by the co-accused. *Id.*

261. *Id.* ¶¶ 46, 63.

262. *Id.* ¶ 44.

263. *Id.*

264. R. v. Brown, 127 A.R. 89, ¶ 22 (Alta C.A. 1992) (Can.), *rev'd*, [1993] 2 S.C.R. 918 (Can. 1993), *available at* 1992 CarswellAlta 667 (Westlaw).

265. *Id.*

266. *Id.* ¶ 99.

267. *Id.*

268. *Id.* (internal quotation marks omitted).

provided by Justice Harradence of the Court of Appeal.[269] Justice Harradence determined that Jones was clearly a state agent who developed a relationship of trust with Brown over the course of their shared incarceration.[270]

The undercover police officers in *Jackson* and *Brown* clearly created relationships of trust that they then exploited to elicit incriminating statements. They took extensive measures to gain the confidence of the accused, even though these relationships did not exist prior to arrest. The Supreme Court in *R. v. Liew*, however, established a minimum floor defining a relationship of trust.[271] In addition to a determination that the exchange with Liew did not amount to the functional equivalent of an interrogation, the Court also held that no relationship of trust existed between Jones and Liew, notwithstanding their common participation in a drug operation.[272] The Court asserted that *Liew* was "not a case where the undercover officer cultivated a *sustained relationship with the accused over time*, such that the accused may be said to have spoken to the undercover officer in the *reasonable expectation* that his communications would not wind up in the hands of the police."[273] The Court posited further that "the facts indicate that the appellant and the officer did not know each other prior to the arrests. In such circumstances, it is difficult, if not impossible, to suggest that the state agent exploited any special characteristics of his relationship with the appellant to extract the statement."[274] The Court concluded that "to speak of a 'relationship' at all seems to exaggerate the circumstances."[275]

Thus, where an undercover police officer has practically no contact or prior relationship and has not cultivated a sustained relationship with the accused over time once contact has been established, it seems unlikely that a court will ever find that a s. 7 violation has taken place. This naturally places an accused in an extremely vulnerable position because of the potential for contact with an undercover police officer in a cell plant. Furthermore, if the undercover police officer is able to procure incriminating state-

269. R. v. Brown, [1993] 2 S.C.R. 918, ¶¶ 1, 3 (Can. 1993), *available at* 1993 CarswellAlta 412 (Westlaw).

270. *Brown*, 127 A.R. 89, ¶ 83 (Harradence, J., dissenting).

271. R. v. Liew, [1999] 3 S.C.R. 227, ¶ 52 (Can. 1999), *available at* 1999 Carswell Alta 821 (Westlaw).

272. *Id.* ¶ 55.

273. *Id.* ¶ 54 (emphasis added).

274. *Id.* ¶ 55.

275. *Id.*

ments in a short span of time, as did Corporal Jones in *Liew*, the incriminating statements will almost always be admitted. If the short relationship between the undercover state agent and the accused is one where the latter cannot have a reasonable expectation that his comments would be communicated to the police, then it seems that even if the agent's conduct amounted to the functional equivalent of an interrogation, the statements may still be admitted.

The "reasonable expectation" accretion to the s. 7 jurisprudence does not add any value to the right to silence.[276] Absent a privileged relationship, such as a lawyer-client or marital relationship, what reasonable legal expectation does any individual have that his incriminating statements to a third party will not be revealed to the police and used against him, whether they are made in detention or outside? The key to a violation of the right to silence is that an accused's right to choose to speak with the state is undermined by the actions of the state agent, and not whether the accused had a reasonable expectation that these statements would not be revealed to the police.

The existence of a relationship of trust and whether a state agent has manipulated that relationship can certainly have an impact upon whether an elicitation has taken place, but its absence should not diminish an accused's constitutional right to silence. Detention itself provides a coercive and anxiety-induced environment such that an accused may want to unburden herself, notwithstanding the lack of a relationship of trust.[277] Because of this, it is critical to examine how the nature of the relationship impacts and contextualizes the nature of the exchange itself and not whether a relationship of trust exists in isolation. The critical aspect of the right to silence is that it offers an accused a choice to speak to authorities. That choice should not be predicated upon the existence of a relationship with someone who may have subverted that choice.

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276. *See, e.g.*, *id.* ¶ 54.

277. In *State v. Travis*, the police placed Langlois, an undercover police officer, into the defendant's cell. State v. Travis, 360 A.2d 548, 549 (R.I. 1976). Langlois was brought to the cell in handcuffs that were removed once he entered the cell. *Id.* Langlois testified that he initiated a conversation with the defendant, who then made incriminating statements. *Id.* The Rhode Island Supreme Court held that Langlois violated the defendant's Fifth Amendment *Miranda* rights as well as his rights under the state constitution. *Id.* at 551. The court stated that: "[t]he mere presence of Langlois was an inducement to speak, and an inducement by a police officer. We see no significant difference between a uniformed police officer asking questions of defendant and Langlois' presence inside the cellblock with defendant." *Id.* In this case, there was no prior relationship of trust, and the mere presence of another person who initiated "casual conversation" was sufficient to elicit incriminating statements. *Id.* at 550.

C. *Reframing Elicitation*

Eliciting incriminating statements requires communication. More often than not such communication will be achieved verbally, through verbal interrogative or declarative statements that call for incriminating responses. Verbal communication is understood and conveyed through tone, the content of what is stated, and body language, in addition to the overall context, including the environment and the relationship between the parties. Accordingly, when courts design legal tests to determine whether incriminating statements have been elicited, they need to factor in these various considerations.[278] The United States Supreme Court's deliberate elicitation test provides an important starting point by focusing on whether the state and its agent took some action that goes beyond mere listening and is designed to elicit incriminating statements.[279] By its terms, "some action" should not be limited to the words that the agent uses to elicit the statements, but should also include the overall conduct of the state and its agent and possibly the use of body language and other subtle cues.

The United States Supreme Court has also stressed the importance of the detention context and how this may impact an accused. Notwithstanding the absence of this consideration in *Kuhlmann*, its acknowledgment by the *Henry* Court indicates that it is becoming a more integral consideration when assessing conduct of the state and its agent, not just a principle that is discarded when inconvenient.[280] Last, in considering elicitation of incriminating information, courts should factor into their deliberations any impact that the nature of the relationship between the state agent and the accused may have on the manner of the exchange and the form it takes. The focus should not be on whether a relationship of trust exists, but on recognizing the effect that any type of relationship, including one that is perhaps threatening, may have in producing incriminating statements.

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278. White asserts that

> the subtle messages that can be communicated through changes in vocal inflection and nonverbal communication pose a formidable factfinding task for the Court. . . . Nevertheless there is a need to provide more meaningful guidance to the police and lower courts. . . . [I]t is possible to identify certain interrogation tactics that are likely to create an unacceptable risk of depriving the suspect of his constitutional rights.

White, *Police Trickery*, *supra* note 26, at 586.

279. *See* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986).

280. *See, e.g.*, United States v. Henry, 447 U.S. 264, 273-74 (1980).

An elicitation test that stresses these various factors will provide a more realistic and contextualized approach to understanding human interaction within the cell-plant context. As Justice Brennan asserted in his *Kuhlmann* dissent, courts need to examine the entire scope of government conduct and not merely look to the specific statements of the agent when eliciting the inculpatory remarks.[281] Examining the entire scope of government conduct should ideally include some form of audio recording that captures not only the actual statements of the state agent, but also the tone and inflections used, which impact the listener's understanding of what is communicated. A more complete examination of the eliciting conduct would, of course, benefit from an actual video recording so that a court could also observe the body language of the agent and the accused during the exchange.

In a cell-plant interrogation, a sound recording device would likely be more feasible than video recording equipment and would, at a minimum, ensure that the factfinder could ascertain the actual words spoken by both parties. Indeed, many jailhouse informants have a proven record of fabricating stories and alleged statements by an accused.[282] Where evidence is introduced by way of jailhouse

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281. *See Kuhlmann*, 477 U.S. at 476 (Brennan, J., dissenting).

282. A variety of convictions have been overturned or impugned due to the admission of fabricated evidence that was based upon informant testimony. *See, e.g.*, R. v. Sophonow, 38 Man. R.2d 198 (Man. C.A. 1986), *available at* 1986 CarswellMan 498 (Westlaw), *not followed in* R. v. Potvin, [1989] 1 S.C.R. 525 (1989 Can.), *available at* 1989 CarswellQue 16; R. v. Morin, 37 C.R.4th 395 (Ont. C.A. 1995), *available at* 1995 OntCarswell 16 (Westlaw). At the conclusion of a commission of inquiry following one such overturned conviction in Canada, Justice Fred Kaufman stated:

> The systemic evidence . . . emanating from Canada, Great Britain, Australia and the United States demonstrated to me that these dangers were not unique to the in-custody informers presented in the *Morin* case. Indeed, a number of miscarriages of justice throughout the world are likely explained, at least in part, by the false, self-serving evidence given by such informers.

1 FRED KAUFMAN, REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN 554 (1998), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_ch3cd.pdf. In the context of a subsequent and similar commission of inquiry, presided over by former Supreme Court of Canada Justice Peter Cory, his Honor issued a strong admonition against the use of jailhouse informants. He stated:

> Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how

informants during such interrogations, courts should, short of banning the use of informant testimony altogether, demand as a constitutional requirement that the state provide audio-recorded evidence to support informant testimony.[283]

Although there are potentially greater dangers to admitting testimony of jailhouse informants absent a taped recording, courts should not necessarily be willing to admit testimony of undercover police officers about their alleged conversations with a defendant absent similar recordings.[284] Commentators have stressed the need for the recording of formal non-undercover interrogations, and nothing less should be expected during surreptitious interrogations.[285] Police officers are capable of faulty memory and, worse still, distorting statements to serve the perceived needs of the state by whom they are employed. While requiring such substantiation through audio recording devices in earlier eras of police investigation may have been impractical, modern technology permits such possibilities.

It is time that the courts require the police to employ such recording methods during cell-plant interrogations because trans-

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much they tend to corrupt the administration of justice. Usually, their presence as witnesses signals the end of any hope of providing a fair trial.

They must be recognized as a very great danger to our trial system. Steps must be taken to rid the courts of this cancerous corruption of the administration of justice. Perhaps, the greatest danger flows from their ability to testify falsely in a remarkably convincing manner. In this case, it will be seen that an experienced detective thought that Mr. Martin, a very frequent jailhouse informant with a conviction for perjury, was a credible witness. He lied in this case and he has testified in at least nine other cases, undoubtedly with the same degree of mendacity. Jailhouse informants are a festering sore. They constitute a malignant infection that renders a fair trial impossible. They should, as far as it is possible, be excised and removed from our trial process.

Jailhouse informants are a uniquely evil group. Justice Kaufman in the Morin Inquiry dealt extensively with jailhouse informants and the harm that they occasion. His thoughtful and helpful recommendations are carefully set out in his report. I will adopt them but go still further in my recommendations on this subject.

MANITOBA JUSTICE, THE INQUIRY REGARDING THOMAS SOPHONOW (2001), http://www.gov.mb.ca/justice/publications/sophonow/appendix/appendixf.pdf.

283. In *Kuhlmann* it was unclear what exactly was said when Wilson and Lee spoke to each other and what Lee may have said to induce Wilson to make his incriminating admissions. *Kuhlmann*, 477 U.S. at 439. In *Broyles II*, the informant's testimony told a much different story than what the detective recounted in his testimony. R. v. Broyles (*Broyles II*), 312 A.R. 31, ¶¶ 6-7 (Alta C.A. 1999) (Can.), *available at* 1999 CarswellAlta 341 (Westlaw).

284. This is not to suggest that where the state agent is an undercover police officer, the court should allow the admission absent recorded verification.

285. *See* Leo et al., *supra* note 35, at 522.

parency of government operations is essential for preserving a fair trial and promoting respect for the integrity of the judicial system. Such minimum requirements further reflect the importance of the constitutional rights that are implicated, for if questioning takes place in the absence of counsel, it should be incumbent on courts to ensure that the manner in which the statements were elicited does not fall short of standards required by principles of adjudicative fairness. Such considerations are consonant with a purposive approach to the rights to silence and counsel in Canada and the United States respectively.

Although the United States version of the elicitation test is preferable to the Canadian version, even under the United States approach "mere listening" should really mean mere listening or its functional equivalent. The *Kuhlmann* Court strayed from a strict interpretation of "mere listening" when it found Kuhlmann's statements—spoken during his conversations with Lee—admissible.[286] It is conceivable that that there is a functional equivalent to mere listening; there is the possibility that a state agent may make some statements that have no reasonable connection to the crime that the accused has committed and would not reasonably call for an incriminating response, yet nevertheless result in the accused making such statements.

The factual context of *Broyles II* helps to illustrate the concept of mere listening or its functional equivalent.[287] Assume that Broyles disclosed his incriminating statements to the state agent following Broyles's conversation with his mother and his pastor in exactly the same manner that was described in the decision.[288] However, instead of Broyles first meeting the agent two weeks prior, they met the very same day that Broyles disclosed the incriminating statements. Assume that following this first meeting, Broyles sensed that the state agent, as compared to other inmates, was a sympathetic individual and thus felt comfortable approaching the agent following his conversation with his mother and pastor.

Would the agent's questions, in the absence of a relationship of trust, still rise to the level of action that went beyond mere listening or its functional equivalent? Indeed, even in the absence of such a relationship, the question "what do you mean?" was likely to elicit

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286. *Kuhlmann*, 477 U.S. at 439; *see also supra* notes 181-196 and accompanying text.

287. For a discussion of the facts of *Broyles II*, 312 A.R. 31, see *supra* notes 216-224 and accompanying text.

288. *See Broyles II*, 312 A.R. 31, ¶ 16.

incriminating statements. Broyles was clearly distraught and his first statement in response to the question alluded to his crime. Therefore, the state agent's question was bound to draw a more elaborate response and could not be construed as mere listening. This is particularly true given that the pressures of confinement can influence some individuals to allay their anxiety by speaking to fellow inmates, regardless whether they have a prior relationship of trust.[289] A question delivered by a state agent pretending to be a fellow inmate that reasonably leads to an inmate uttering incriminating statements is action that goes beyond mere listening.

By contrast, imagine the following variation of the hypothetical. Instead of Broyles seeking out the state agent following the conversation with his mother and pastor, he sits alone in a corner quietly. The state agent has no particular knowledge of Broyles's mother's visit and approaches Broyles asking him about his day. Broyles then says "I've seen better days." The state agent responds, "I know what that's like, but things get better, don't worry." Broyles then responds: "Can't help but worry, I'm going to burn in hell for killing my girlfriend." The state agent responds, "Whoa. Listen, don't go repeating that to the wrong people, it could land you in trouble." Broyles, realizing what he just said, changes the topic quickly. In this scenario, the state agent's statements prior to Broyles's inculpatory remarks would be the functional equivalent of "mere listening" because his comments would not reasonably lead to an incriminating response. The normative argument in support of this reading is that while custodial environments do impose a certain degree of pressure, defendants can make voluntary statements that are completely unsolicited.

CONCLUSION: REINVIGORATING FUNDAMENTAL RIGHTS

This Article has explored the constitutional approaches to cell-plant interrogations in Canada and the United States. While it is clear that constitutional protections exist in both countries, these protections are far from perfect with respect to providing adequate safeguards to the accused. The Sixth Amendment, as interpreted by the United States Supreme Court, only comes into effect once formal proceedings have commenced against an accused with respect to a particular offense, leaving an individual in the United States without any effective prophylaxis against cell-plant interrogations prior to this period. Furthermore, in order for the Sixth

289. *See, e.g.*, State v. Travis, 360 A.2d 548, 551 (R.I. 1976).

Amendment to have any effect on suppressing statements acquired during a cell-plant interrogation, the accused must show that a contractual relationship existed between the putative state agent and the authorities. In various state and federal jurisdictions, the contractual requirement seems to require a more express agreement, whereas in others the agreement may be implied.

The Canadian Charter's s. 7 right to silence provision protects an accused upon arrest or detention, but is spatially confined to a detention setting. While more flexible on determining state agency, the Supreme Court of Canada's interpretation of elicitation under s. 7 requires the accused to show a significant relationship of trust between the accused and the state agent, one that makes an accused more vulnerable if the incriminating statements are made soon after being placed in detention to a person he may have spoken to for a few hours or less.

The rights to counsel and silence in the United States and Canada respectively require significant strengthening. One of the primary purposes of these rights is to provide a considerable degree of fundamental fairness to individuals subjected to criminal investigation by the superior power of law enforcement officials. When the Supreme Courts of Canada and the United States extended constitutional protections to individuals subjected to cell-plant interrogations, they recognized that to do otherwise would allow police officers to do surreptitiously what they could not do directly.[290] Yet, by establishing such significant hurdles for accuseds to prove violations of their constitutional rights, the Courts in both countries have effectively undermined these rights.[291] In so doing, these rights almost become a facade. One way in which to reestablish a considerable degree of fairness for Canadian and United States suspects in these contexts would be to combine the most progressive

290. *See, e.g.*, R. v. Hebert, [1990] 2 S.C.R. 151, ¶ 123 (Can. 1990), *available at* 1990 CarswellYukon 7 (Westlaw).

291. Courts need to recognize the realities of prison life and the pressures and anxieties inherent within. One study recounts the revelations of Sol Wachtler, a former Chief Judge for the New York Court of Appeals, who, after being incarcerated, noted the skewed picture that judges are presented of life in detention. He wrote: "'I always knew that I was seeing only what I was supposed to see [as a judge], but I felt my visit was a demonstration to the inmates that we cared about their conditions.'" *See* MORRIS, *supra* note 21, at 180 (citing Colman McCarthy, *A Judge's Report from Behind Bars*, WASH. POST, Mar. 30, 1995, at A17). Wachtler further reflected however that "'[n]ow that I am prisoner and judges are being shown the facility that imprisons me, I realize how deluded I was in those years by my own vanity and by those escorts who so carefully planned my itinerary.'" *Id.*

and protective attributes of the applicable Canadian and American law.

The legal tests and factors used to determine the existence of state agency and elicitation should be reformulated in both countries. For instance, with respect to evaluating the establishment of state agency, courts in Canada and the United States should look to whether law enforcement officials intervened in some manner that had a tangible impact on the exchange between the accused and the putative agent. In determining what constitutes an agency relationship between the state and a jailhouse informant, courts should look to both overt and subtle forms of communication that the state may use to signal to an informant that it is interested in receiving information about other individuals within the jailhouse or prison environment, regardless whether such individuals are specifically identified or not. The focus should be on the intervention of the state in stimulating an exchange between an agent and an accused. Courts should not deny the existence of an agency relationship merely because the agent is not promised or provided remuneration.

The Supreme Court of Canada and the United States Supreme Court should adopt a broader test for determining elicitation that expands on the latter's deliberate elicitation test enunciated in *Kuhlmann*.[292] Under a broadened test, defendants in Canada and the United States who seek to quash any incriminating statements procured through a cell-plant interrogation should have to satisfy the following test: taking into account the pressures of confinement and its impact upon the accused, did the police or its agents take some action beyond mere listening or its functional equivalent, that was designed deliberately to elicit incriminating remarks from the accused? Furthermore, unlike the *Kuhlmann* Court's application of that test, "mere listening" should actually *mean* "mere listening" or its functional equivalent. This is particularly true where discussion is initiated about the crime or crimes for which the accused is charged or could reasonably lead to the utterance of incriminating statements about the crimes charged. In addition, when the elicitation takes place in the detention context, courts must take into account how the contextual impact of confinement may have heightened the impact of the agent's actions leading to the utterance of the incriminating statements.

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292. *See* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986).

Courts should examine the full course of conduct by the state and its agents when assessing whether a suspect's statements were elicited. For example, where the agent has developed a relationship with the accused, the extent to which such an agent may have to take "some action" beyond mere listening may be significantly less than an agent who is able to elicit incriminating statements from an accused she has just met. However, the absence of such a relationship should not lead to the conclusion that a state agent in such circumstances must then ask questions that are akin to a formal interrogation or its functional equivalent. As long as the agent commits to some action beyond mere listening or its functional equivalent, such conduct should be sufficient to demonstrate elicitation.

Lastly, in order to properly assess the record in a more comprehensive manner, including the actions of the state agent, the entire course of the communications between the agent and the accused should be recorded. Courts will then not have to rely solely upon the potential fabrications of the accused or a jailhouse informant or the genuinely faulty memory of any state agent in recounting the details of the exchange.

Emphasizing such flexible factors will be consistent with a purposive interpretation of the s. 7 right to silence and the Sixth Amendment right to counsel, one that draws upon "the principles of adjudicative fairness" and "concern for fair treatment of an accused person."[293] It will provide more meaningful substance to these fundamental constitutional rights that exist to limit the overwhelming and overreaching power of the state against individuals. This power imbalance is heightened against suspects who are detained by the state and subject to intense anxieties inherent to custody.[294]

United States and Canadian courts are the vanguards of constitutional protections. To allow the state to circumvent such fundamental rights by exploiting a detainee's vulnerability in such a deceptive manner cannot be in accordance with the purpose of the Canadian Charter or the United States Constitution. Courts must restore balance to this disequilibrium lest these core protections be so easily circumvented by unfair state tactics that they are rendered practically obsolete.

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293. R. v. Brydges, [1990] 1 S.C.R. 190, ¶ 13 (Can. 1990), *available at* 1990 CarswellAlta 3 (Westlaw) (citing R. v. Clarkson, [1986] 1 S.C.R. 383 (Can. 1986), *available at* 1986 CarswellNB 14 (Westlaw)).

294. *See* discussion *supra* Part I.